In the
Supreme Court of the United States

FAIRBANKS NORTH STAR BOROUGH,

Petitioner,

v.

U.S. ARMY CORPS OF ENGINEERS;
JOHN W. PEABODY; and KEVIN J. WILSON,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a Jurisdictional Determination under the Clean Water Act, finding that Petitioner's property is subject to that Act's strictures, a "final agency action" subject to judicial review under the Administrative Procedure Act, where the Jurisdictional Determination: (1) affords the landowner a viable estoppel defense in a future enforcement action; (2) decides whether a CWA permit is necessary; and (3) subjects the landowner to elevated penalties?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Fairbanks North Star Borough (Borough) respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The panel opinion of the court of appeals is published at 543 F.3d 586 (9th Cir. 2008) (Appendix (App.) A). The panel opinion of the court of appeals denying the Petition for Rehearing En Banc is not published and is included in Appendix C. The opinion of the district court granting the motion for judgment on the pleadings is not published and is included in Appendix B.

JURISDICTION

On May 18, 2007, the district court dismissed the Borough's complaint, holding that it lacked jurisdiction to review the Borough's challenge to a Jurisdictional Determination issued to the Borough by Respondent United States Army Corps of Engineers under the Clean Water Act, 33 U.S.C. § 1251, *et seq.* On September 12, 2008, the Ninth Circuit Court of Appeals affirmed the judgment of the district court. That court denied the Borough's Petition for Rehearing en Banc on November 20, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS AT ISSUE

The Clean Water Act (CWA) provides in pertinent part:

> Except as in compliance with this section and section[] . . . 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1311(a) (CWA § 301(a)).

> The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.

33 U.S.C. § 1344(a) (CWA § 404(a)).

The Administrative Procedure Act (APA) provides in pertinent part:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.

5 U.S.C. § 704.

The Corps's administrative regulations pertaining to JDs provide in pertinent part:

> The Corps has authorized its district engineers to issue formal determinations concerning the applicability of the Clean Water Act or the Rivers and Harbors Act of 1899 to activities or tracts of land and the applicability of general permits or statutory

> exemptions to proposed activities. A determination pursuant to this authorization shall constitute a Corps final agency action.

33 C.F.R. § 320.1(a)(6).

> The terms and definitions contained in 33 CFR Parts 320 through 330 are applicable to this part. In addition, the following terms are defined for the purposes of this part:
>
> . . . .
>
> Approved jurisdictional determination means a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel. Approved JDs are clearly designated appealable actions and will include a basis of JD with the document.
>
> Basis of Jurisdictional Determination is a summary of the indicators that support the Corps approved JD. Indicators supporting the Corps approved JD can include, but are not limited to: indicators of wetland hydrology, hydric soils, and hydrophytic plant communities; indicators of ordinary high water marks, high tide lines, or mean high water marks; indicators of adjacency to navigable or interstate waters; indicators that the wetland or waterbody is . . . part of a tributary system; or indicators of linkages between isolated water bodies and interstate or foreign commerce.

> Jurisdictional determination (JD) means a written Corps determination that a wetland and/or waterbody is subject to regulatory jurisdiction under Section 404 of the Clean Water Act (33 U.S.C. 1344) or a written determination that a waterbody is subject to regulatory jurisdiction under Section 9 or 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401 et seq.). Additionally, the term includes a written reverification of expired JDs and a written reverification of JDs where new information has become available that may affect the previously written determination. For example, such geographic JDs may include, but are not limited to, one or more of the following determinations: the presence or absence of wetlands; the location(s) of the wetland boundary, ordinary high water mark, mean high water mark, and/or high tide line; interstate commerce nexus for isolated waters; and adjacency of wetlands to other waters of the United States. All JDs will be in writing and will be identified as either preliminary or approved. JDs do not include determinations that a particular activity requires a DA permit.

33 C.F.R. § 331.2.

> General. The administrative appeal process for approved JDs, permit denials, and declined permits is a one level appeal, normally to the division engineer. The appeal process will normally be conducted by the [Review Officer (RO)]. The RO will

> document the appeal process, and assist the division engineer in making a decision on the merits of the appeal. The division engineer may participate in the appeal process as the division engineer deems appropriate. The division engineer will make the decision on the merits of the appeal, and provide any instructions, as appropriate, to the district engineer.

33 C.F.R. § 331.7(a).

> The final decision of the division engineer on the merits of the appeal will conclude the administrative appeal process, and this decision will be filed in the administrative record for the project.

33 C.F.R. § 331.9(c).

INTRODUCTION

This case concerns the exceptionally important matter of the meaning of "final agency action" under the APA, and the meaning of this Court's decision in *Bennett v. Spear*, 520 U.S. 154 (1997). Specifically, can a landowner seek judicial review of a formal agency decision that authoritatively determines that the landowner's property is subject to the strictures of the CWA or must the landowner wait until some undefined point in the future to obtain judicial review of that agency decision. The regulations of the United States Army Corps of Engineers provide landowners with an administrative process whereby the Corps will determine if their property is subject to the CWA. This process, used by thousands of landowners across the

country every year, produces what is called a "Jurisdictional Determination." A Jurisdictional Determination finding jurisdiction puts the landowner on notice that, prior to commencing any earthmoving or fill activity, the landowner must first obtain a permit from the Corps.

Here, the Borough, wishing to build playgrounds and an athletic field, requested a Jurisdictional Determination from the Corps. The agency responded with a Jurisdictional Determination finding that the site of the proposed development contained regulable wetlands under the CWA. The Borough disagreed with the Corps's analysis and filed suit under the APA to challenge the Jurisdictional Determination. The district court dismissed the Borough's complaint. The Ninth Circuit affirmed, concluding that the Jurisdictional Determination does not constitute final agency action because it does not change the legal rights or obligations of a party.

The Ninth Circuit's finality analysis is seriously flawed, and has the immediate result of forcing landowners throughout the West to endure the heavy burden of the CWA permitting process, even where ultimately the Corps may have no jurisdiction. The Ninth Circuit's decision creates this regulatory nightmare unnecessarily: a Jurisdictional Determination *does* constitute final agency action because it *does* change the rights and obligations of the party, most importantly by affording a landowner with an estoppel defense to avoid legal liability in any subsequent enforcement action. The Ninth Circuit's decision also conflicts with the line of cases following *Leedom v. Kyne*, 358 U.S. 184 (1958), which holds that

judicial review is always immediately available to prevent gross abuses of agency power.

For these reasons, more fully set forth below, the Borough respectfully requests that this Court grant the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The Fairbanks North Star Borough, a political subdivision of the State of Alaska, holds title to approximately 115,000 acres of land, some of which it develops, markets, and sells. The property at issue in this case comprises 2.1 acres which the Borough wishes to develop into playgrounds, athletic fields, restrooms, concessions, and related structures. On October 26, 2005, the Borough requested a Jurisdictional Determination from the Corps. Administrative Record (Admin. R.) at 68. On November 3, 2005, the Corps issued a positive preliminary Jurisdictional Determination. *Id.* at 62. The Borough subsequently requested a final determination. *Id.* at 60. On December 13, 2005, the Corps issued a positive final Jurisdictional Determination, finding that the Borough's entire parcel contains waters of the United States. *See id.* at 51. The appeal held that, notwithstanding the presence of permafrost on the Borough's property (meaning that the ground is frozen for most days of the year), the property contains regulable *wetlands*. On February 8, 2006, the Borough filed an administrative appeal, contending that the Jurisdictional Determination was inconsistent with the 1987 Wetlands Manual. *See id.* at 11. On May 26, 2006, the Corps's then-appellate officer, Brigadier General John W. Peabody, denied the appeal and upheld the Corps's final Jurisdictional Determination finding jurisdiction. *Id.* at 4.

The Borough then filed a complaint in the District of Alaska under the APA, seeking declaratory and injunctive relief. The Borough's principal claim was that the Corps had used an incorrect standard for determining whether the Borough's property contained jurisdictional wetlands. Specifically, the Borough contended that the Corps had used a metric for establishing the Fairbanks-area wetlands growing season that is inappropriate for extremely cold climates. Moreover, the Borough contended that the growing season standard used by the Corps for the Borough's Jurisdictional Determination conflicted with the Corps's authoritative 1987 Wetlands Manual.[1]

The District Court Decision

Ruling on the Corps's motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure, the district court held that it lacked jurisdiction to review the Jurisdictional Determination. Specifically, the court held that (1) the Jurisdictional Determination did not constitute final agency action under the APA, App. at B-6, (2) the CWA affirmatively precluded review of the Jurisdictional Determination, *id.* at B-6–B-7, and (3) the Jurisdictional Determination was not ripe for review, *id.* at B-7–B-8.

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[1] The Borough did not object to the entry of judgment on its Second Claim for Relief, which contended that the Corps's promulgation of the "Alaska Rule" (Special Public Notice 2003-05), a specialized rule applicable only to Alaska for identifying wetlands, was illegal because it had not been subjected to the APA's notice-and-comment procedures. The Borough conceded that the Corps's revocation of the Alaska Rule mooted that claim. *See* App. at B-3 n.4.

The Ninth Circuit's Decision

The Borough appealed the dismissal to the Ninth Circuit, which affirmed, reaching only the issue of final agency action. Although agreeing with the Borough that, under this Court's *Bennett* decision, the Jurisdictional Determination represents the consummation of the Corps's decisionmaking process with respect to CWA jurisdiction over the Borough's property, the Ninth Circuit found that review must be withheld, because the Jurisdictional Determination purportedly does not affect the Borough's rights or obligations. *See Fairbanks N. Star Borough*, 543 F.3d at 593 (App. at A-12). In reaching this conclusion, the court reasoned that any legal obligation attaching to the Borough derives from the CWA, not from the Jurisdictional Determination, and that the Borough is not denied judicial review entirely, because it can raise the jurisdictional issue in a permit contest or enforcement proceeding. *See id.* at 593-95 (App. at A-12–A-15).

The Ninth Circuit rejected each of the Borough's arguments as to why the Jurisdictional Determination affects the Borough's rights and obligations. The court dismissed the Borough's argument that the Jurisdictional Determination may serve as the basis for an augmented penalty in a future enforcement proceeding, on the grounds that the "jurisdictional determination has no more legal effect on Fairbanks' ability eventually to assert a good faith defense than would, for example, a report by a private wetlands consultant informing Fairbanks that its property contained wetlands." *Id.* at 595 (App. at A-17). The court rejected the Borough's contention that the Jurisdictional Determination requires the Borough to

seek a CWA permit (which it otherwise would not apply for), on the grounds that "Fairbanks' legal obligations—including any obligation to pursue a Section 404 dredge and fill material discharge permit—have always arisen solely on account of the CWA," not from the Jurisdictional Determination. *Id.* at 596 (App. at A-18). Lastly, the court found no merit to the Borough's argument that, had the Corps issued a Jurisdictional Determination finding no CWA jurisdiction, the Jurisdictional Determination would have provided the Borough with a good estoppel defense in a future enforcement action. Although such a Jurisdictional Determination would have legal consequences, *see id.* at 596 n.12 (App. at A-18–A-19), the court reasoned that, because the Borough's Jurisdictional Determination found jurisdiction, and thus the Borough would have no need or opportunity to present an estoppel defense, the Borough's Jurisdictional Determination does not have legal consequences.

REASONS FOR GRANTING THE WRIT

I

THIS COURT SHOULD GRANT THE PETITION TO SETTLE AN IMPORTANT QUESTION OF LAW, NAMELY, WHETHER A LANDOWNER MAY SEEK JUDICIAL REVIEW OF A JURISDICTIONAL DETERMINATION

The Ninth Circuit's decision forces landowners throughout the western United States who believe that their property is not subject to the CWA (notwithstanding a Jurisdictional Determination to the contrary) into a dilemma: (1) abandon their

development plans; (2) agree to participate in the CWA permitting process, a process that even the panel decision conceded to be arduous and expensive, *Fairbanks N. Star Borough*, 543 F.3d at 596 n.11 (App. at A-17); or (3) proceed in spite of the Jurisdictional Determination, and incur the risk of significant penalties (without appealing the determination). The Ninth Circuit's conclusion that a Jurisdictional Determination does not have legal consequences, *see id.* at 593 (App. at A-12), raises an exceptionally important issue of law having far-reaching effect on land use and development throughout the western United States. Moreover, its conclusion conflicts with the settled rule that permit decisions are judicially reviewable.

The Ninth Circuit acknowledged that a Jurisdictional Determination finding no jurisdiction may well have legal consequences, yet strangely concluded that a Jurisdictional Determination finding jurisdiction does not. *See id.* at 596-97 (App. at A-18–A-19). But if (1) a landowner is *entitled under law* to a Jurisdictional Determination finding no jurisdiction (because his property does not contain jurisdictional wetlands), and (2) the Corps *wrongfully* issues a Jurisdictional Determination finding jurisdiction, then (3) the landowner should have an opportunity to contest the Corps's determination in court. *Cf. Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 112-13 (1948) ("[A]dministrative orders are not reviewable unless and until they impose an obligation, *deny a right* or fix some legal relationship as a consummation of the administrative process.") (emphasis added).

If the Ninth Circuit's reasoning were applied to a CWA permit denial, then such a denial would not be judicially reviewable. Yet a permit denial *is* reviewable precisely because, *if* the permit is granted, *then* the landowner has a legal right to fill wetlands free from liability. As shown below, neither the Corps nor the courts hold that CWA permit denials are beyond judicial review. So it should be with Jurisdictional Determinations. *See* Ian Sutton & Steven F. Hill, *Reevaluating Judicial Review and the Corps' Jurisdictional Determinations*, 22 Nat. Resources & Env't 29 (Sum. 2007).

The Jurisdictional Determination process is critically important for the regulated public. As of 2003 (the most recent year for which statistics are available), the Corps processed over 74,000 Jurisdictional Determinations.[2] But the process's value is substantially undercut if landowners cannot seek judicial review of Jurisdictional Determinations. Perhaps for that reason, the Corps, in promulgating regulations governing the Jurisdictional Determination administrative appeal process, "decided not to address . . . when a JD should be considered a final agency action." 65 Fed. Reg. 16,486, 16,488 (Mar. 28, 2000). If the Corps will not speak, this Court should. The Ninth Circuit's decision to withhold judicial review converts the Jurisdictional Determination process into a grand waste of time, money, and effort. Review in this Court is merited to decide the important question of reviewability of Jurisdictional Determinations.

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[2] *See* http://www.usace.army.mil/CECW/Documents/cecwo/reg/2003webcharts.pdf (last visited Feb. 6, 2009).

A. Legal Consequences Flow from a Jurisdictional Determination

An agency action is final if it marks the consummation of the decisionmaking process and either determines rights or obligations, or is such that legal consequences flow from it. *Bennett*, 520 U.S. at 177-78. A Jurisdictional Determination both marks the culmination of the Corps's decisionmaking process regarding its CWA authority, and produces legal consequences. Whether a jurisdictional determination meets the second *Bennett* requirement for APA finality is an important question that can only be resolved by this Court.

Contrary to the decision below, this Court should grant certiorari to hold that the legal consequences prong is met because the Jurisdictional Determination process affords legal immunity to landowners through an estoppel defense. *See United States v. Tallmadge*, 829 F.2d 767, 773 (9th Cir. 1987) (noting that an estoppel defense "applies when an official tells the defendant that certain conduct is legal and the defendant believes the official") (internal quotation marks omitted). *Cf. Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002) ("In some circumstances, if the language of the document is such that private parties can rely on it as a norm or *safe harbor* by which to shape their actions, it can be binding as a practical matter.") (emphasis added; internal quotation marks omitted).

Moreover, this Court should clarify that a Jurisdictional Determination directly and immediately alters a landowner's course of conduct, because it represents the authoritative determination of the responsible agency that the landowner is subject to

CWA strictures and thus must seek a permit to continue with his project.[3] *See* 60 Fed. Reg. 37,280, 37,282 (July 19, 1995) ("[A] jurisdictional determination . . . establishes whether a particular area is subject to regulatory authority under section 404 of the Clean Water Act . . . ."). *Cf. Or. Natural Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 987 (9th Cir. 2006) ("[A]n agency action may be final if it has a direct and immediate . . . effect on the day-to-day business of the subject party.") (internal quotation marks omitted).

Finally, this Court should resolve this issue because an unreviewed, positive Jurisdictional Determination substantially increases the likelihood that any civil fine assessed against the landowner will be greater than otherwise would be the case. *See* 33 U.S.C. § 1319(d) (noting "good faith" as one of the factors). *Cf. United States v. Key West Towers, Inc.*, 720 F. Supp. 963, 965-66 (S.D. Fla. 1989) (filling of wetlands in violation of Corps's cease-and-desist letter justifies substantial civil penalty); *Hanson v. United States*, 710 F. Supp. 1105, 1109 (E.D. Tex. 1989) (upholding substantial administrative penalty owing in part to violation of three cease-and-desist orders);

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[3] The CWA permitting process can be long and arduous. *See Rapanos v. United States*, 547 U.S. 715, 721 (2006) (plurality opinion) ("The average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes. Sunding & Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Natural Resources J. 59, 74-76 (2002)."); *Fairbanks N. Star Borough*, 543 F.3d at 596 n.11 (App. at A-17) ("We appreciate that navigating the CWA permitting process is no small task.").

United States v. Ciampitti, 669 F. Supp. 684, 699 (D.N.J. 1987) (substantial civil penalty justified based upon defendant's knowing disregard of CWA). *Cf.* 33 U.S.C. § 1319(d) (authorizing civil penalties of $25,000 per day per violation).

B. The Ninth Circuit's Decision Conflicts with the Settled Rule That Agency Decisions on Permit Applications Are Subject to Judicial Review

The Ninth Circuit agreed with the Borough that *one* outcome of the Jurisdictional Determination process—namely, a Jurisdictional Determination finding no jurisdiction—would likely be reviewable because it would provide the landowner with an estoppel defense in a subsequent enforcement action.

> Fairbanks may be correct that an official Corps statement that a property is *not* a jurisdictional wetland subject to the CWA's permitting requirements could be the basis for an estoppel defense. When an authorized government official tells the defendant that a course of action is legal and the defendant reasonably relies to its detriment on that erroneous representation, then fairness and due process may prohibit the state from punishing the defendant for that unlawful conduct. Courts have recognized that finality can result if the language of the document is such that private parties can rely on it as a safe harbor by which to shape their actions.

Fairbanks N. Star Borough, 543 F.3d at 596 n.12 (App. at A-18–A-19) (citations, quotation marks, and ellipses

omitted). Yet in a wholly inconsistent application of the law, the Ninth Circuit labeled as a "non sequitur" the Borough's assertion that a Jurisdictional Determination finding jurisdiction is also judicially reviewable, reasoning that the assertion was based on "the dubious premise that if an agency's decisionmaking process has multiple outcomes and *any* of these outcomes is judicially reviewable, then *all* of them must be judicially reviewable." *See id.* at 596-97 (App. at A-19).

On this point, the holding of the lower court's decision conflicts with the settled rule that CWA permit decisions are judicially reviewable. For the Ninth Circuit's decision takes no account of the nearly perfect analogy between Jurisdictional Determinations and Corps permit decisions, which are judicially reviewable *regardless* of their outcome. *See, e.g., Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272 (D.C. Cir. 2005) (issuance of CWA nationwide permits subject to judicial review); *Michigan Peat, a Div. of Bay-Houston Towing Co. v. EPA*, 175 F.3d 422 (6th Cir. 1999) (permit grant subject to judicial review); *Child v. United States*, 851 F. Supp. 1527, 1533 n.11 (D. Utah 1994) (permit denial subject to judicial review); *Sierra Club v. U.S. Army Corps of Eng'rs*, 935 F. Supp. 1556, 1565 n.10 (S.D. Ala. 1996) (permit grant subject to judicial review). The Corps below advanced the position that permit decisions are reviewable, *see* Corps Answering Brief at 14 ("[The Borough] can apply to the Corps for a permit under Section 404. If its application is denied, the Borough can appeal administratively and then seek judicial review under the APA."), as did the Ninth Circuit's decision. *See Fairbanks N. Star Borough*, 543 F.3d at 594-95 (App. at A-14–A-15) ("It is settled law

that the federal courts have the final say on the scope of the CWA. In exercising that authority, we would not give the government's position that CWA regulatory jurisdiction exists any particular deference simply because the Corps' views on the matter were formulated in the context of an approved jurisdictional determination rather than, for example, a permit application or enforcement proceeding.") (footnote omitted).

Just as a disappointed permittee can challenge in court the Corps's denial of his permit application, so too should the Jurisdictional Determination applicant be able to challenge in court the Corps's decision that his property is subject to the CWA. In the former instance, the permit denial precludes the landowner from legally discharging dredge-and-fill material into the waters of the United States, yet the legal rights and obligations of the landowner remain the same after the permit denial as before the permit was applied for. Nevertheless, both the Corps and the courts acknowledge that a permit denial is judicially reviewable. In the latter instance, the Jurisdictional Determination finding jurisdiction precludes the landowner from using the Jurisdictional Determination as the basis for an estoppel defense and proceeding with his development project without having to obtain a CWA permit. Just as in the permit context, where the particular outcome of the permit proceeding—grant or denial—does not affect whether that outcome is judicially reviewable, the same ought to be true with Jurisdictional Determinations.

The essential point is this: if an administrative proceeding is capable of producing an outcome that would constitute final agency action, and if a

participant in the concluded proceeding contends that, under the law, he has *a legal right* to a particular outcome that *would* constitute a final agency action, then the agency's denial of that outcome is itself a final agency action susceptible to judicial review. The logic of a contrary position would render every permit denial, in every circumstance, unreviewable. That has never been the law. *See, e.g.*, *Child*, 851 F. Supp. at 1533 n.11; *Leslie Salt Co. v. United States*, 789 F. Supp. 1030, 1033 (N.D. Cal. 1991) (decision on permit application constitutes final agency action).

The Ninth Circuit's adoption of the contrary position therefore raises an issue of exceptional importance meriting the review of this Court.

II

THIS COURT SHOULD GRANT THE PETITION BECAUSE THE DECISION CONFLICTS WITH *LEEDOM v. KYNE* AND DECISIONS OF OTHER COURTS OF APPEALS

The Borough argued below that, even if a Jurisdictional Determination would normally not be subject to judicial review, any such bar should be removed given the magnitude of regulatory overreach produced by the Corps's theory justifying regulation of the Borough's property. The Ninth Circuit rejected *sub silentio* the argument. In doing so, the lower court's ruling conflicts with this Court's decision in *Leedom v. Kyne*, 358 U.S. 184, as well as the decisions of the courts of appeals in *Rueth v. EPA*, 13 F.3d 227 (7th Cir. 1993), and *Southern Ohio Coal Co. v. Office of Surface Mining, Reclamation and Enforcement, Department of Interior*, 20 F.3d 1418 (6th Cir. 1994).

Leedom requires that federal courts hear challenges to an agency's jurisdiction when judicial review is necessary to protect a right conferred by Congress. *See* 358 U.S. at 191. The case concerned the National Labor Relations Board's decision to include professional with nonprofessional workers into one collective bargaining unit without allowing the professional workers to vote upon the action, as required by Section 9(b)(1) of the National Labor Relations Act. The Supreme Court had previously held that Board orders do not constitute "final agency action," and that the legality of Board orders can only be reviewed through the Act's express provision—Section 10(c)—for challenging or reviewing enforcement orders or unfair labor practices. *See id.* at 187. Nevertheless, *Leedom* determined that the Board's action was immediately reviewable.

> Plainly, this was an attempted exercise of power that had been specifically withheld. It deprived the professional employees of a "right" assured to them by Congress. Surely, in these circumstances, a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given.

Id. at 189. The Court reasoned that in such circumstances, the inference would be strong that Congress intended the "general jurisdiction of [the federal] courts to control." *Id.* at 190.

The Corps's action in this case also merits review under the *Leedom* doctrine. The *Leedom* doctrine permits the exercise of general federal jurisdiction—here under the APA—to allow judicial review of agency action that implicates the fundamental right to use and enjoy property. As noted

above, *see, supra*, at 7-8, the Corps's theory for jurisdiction over the Borough's property—that permafrost can constitute regulable wetlands—would justify federal regulatory control over much private property in Alaska. Both the Seventh and Sixth Circuits have recognized the applicability of the *Leedom* doctrine in precisely this context of "[a] complete[] overexten[sion of] the[agency's] authority." *Rueth*, 13 F.3d at 231. *See S. Ohio Coal Co.*, 20 F.3d at 1427.

For example, in *Rueth*, the Seventh Circuit declined to review a CWA compliance order asserting jurisdiction over the plaintiff's wetlands because the CWA, as then interpreted, extended CWA authority to all wetlands with even the most tenuous of connections to interstate waters. *See Rueth*, 13 F.3d at 231. But that rationale can no longer stand given the significant narrowing of the Corps's authority following subsequent decisions of this Court. *See Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (rejecting migratory bird rule); *Rapanos v. United States*, 547 U.S. 715 (2006) (rejecting hydrological connection rule). Similarly here, the Corps's assertion that permafrost can constitute regulable wetlands constitutes such a marked expansion of CWA authority as to justify this Court's review of the Jurisdictional Determination under *Rueth* and *Leedom*.[4]

Thus, the Ninth Circuit's *sub silentio* determination that the *Leedom* doctrine does not apply

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[4] The Sixth Circuit in *Southern Ohio Coal Co.* found the *Leedom* doctrine inapplicable based upon its conclusion that the CWA's grant of enforcement authority presupposes a correlative grant of investigatory authority. *See* 20 F.3d at 1427-28.

therefore creates a conflict with the case law of this Court and of other courts of appeals, meriting certiorari.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

DATED: February, 2009.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FAIRBANKS NORTH STAR BOROUGH, *Plaintiff-Appellant*, v. U.S. ARMY CORPS OF ENGINEERS; JOHN W. PEABODY; KEVIN J. WILSON, *Defendants-Appellees.*	No. 07-35545 D.C. No. CV-6-0026-F-RRB OPINION

Appeal from the United States District Court
for the District of Alaska
Ralph R. Beistline, District Judge, Presiding

Argued and Submitted
August 4, 2008—Anchorage, Alaska

Filed September 12, 2008

Before: Dorothy W. Nelson, A. Wallace Tashima and Raymond C. Fisher, Circuit Judges.

Opinion by Judge Fisher

COUNSEL

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OPINION

FISHER, Circuit Judge:

The Clean Water Act ("CWA") makes it unlawful to discharge dredged and fill material into the waters of the United States except in accord with a permitting regime jointly administered by the Army Corps of Engineers ("Corps") and the Environmental Protection Agency ("EPA"). *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985). Fairbanks North Star Borough ("Fairbanks") seeks judicial review of a Corps' "approved jurisdictional determination," which is a written, formal statement of the agency's view that Fairbanks' property contained waters of the United States and would be subject to regulation under the CWA. We have jurisdiction under 28 U.S.C. § 1291, and we affirm the district court's dismissal on the pleadings for lack of jurisdiction. The Corps' approved jurisdictional determination is not

final agency action within the meaning of the Administrative Procedure Act ("APA"), 5 U.S.C. § 704.

BACKGROUND[1]

"The burden of federal regulation on those who would deposit fill material in locations denominated 'waters of the United States' is not trivial." *Rapanos v. United States*, 547 U.S. 715, 721 (2006) (plurality opinion). Under the CWA, "any discharge of dredged or fill materials into . . . 'waters of the United States'[ ] is forbidden unless authorized by a permit issued by the Corps of Engineers pursuant to" Section 404 of the CWA, which is codified at 33 U.S.C. § 1344. *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1391 (9th Cir. 1995); *see also Riverside Bayview*, 474 U.S. at 123; *Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 486 F.3d 638, 646 (9th Cir. 2007). "The Corps has issued regulations defining the term 'waters of the United States,'" *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 163 (2001), to include most wetlands adjacent to waters of the United States that are not themselves wetlands, *see* 33 C.F.R. § 328.3(a)(7).

Fairbanks wishes to develop a 2.1 acre tract of property for its residents' recreational use. It intends to build "playgrounds, athletic fields, concession stands, restrooms, storage buildings, road[s], and parking lots," the construction of which will "include the placement of fill material." In October 2005,

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[1] On review of a judgment on the pleadings, we "accept all material allegations in the complaint as true and construe them in the light most favorable to [the non-moving party]." *Turner v. Cook*, 362 F.3d 1219, 1225 (9th Cir. 2004) (internal quotation marks omitted and alterations in original).

Fairbanks wrote to the Corps to "ask[ ] for [its] review and determination" that it could place fill material on its property without further ado. It asked the Corps to "provide a detailed, scaled drawing showing the . . . wetlands in relation to the lot boundaries." The Corps thereafter issued a "preliminary" jurisdictional determination finding that Fairbanks' entire parcel contained wetlands. Fairbanks then requested that the Corps provide an "approved" jurisdictional determination. In December 2005, the Corps obliged Fairbanks and replied:

> Based on our review of the information you furnished and available to our office, we have determined that the entire parcel described above contains waters of the United States . . . under our regulatory jurisdiction . . . . This approved jurisdictional determination is valid for a period of five (5) years . . . unless new information supporting a revision is provided to this office . . . .

The Corps' letter went on to remind Fairbanks that "Section 404 of the Clean Water Act requires that a[ ] permit be obtained for the placement or discharge of dredged and/or fill material into waters of the U.S., including wetlands, prior to conducting the work." Fairbanks took a timely administrative appeal of the approved jurisdictional determination, which the Corps found to be without merit in May 2006. Fairbanks has not since applied for a Section 404 permit. Nor has the Corps initiated any pre-enforcement or enforcement action.

In August 2006, Fairbanks brought this suit to set aside the Corps' approved jurisdictional determination. According to Fairbanks, the Corps acted unlawfully in

asserting that its property was subject to CWA regulatory jurisdiction. Fairbanks contended that its property could not possibly be a wetland because it is "underlain by shallow permafrost at a depth of 20 inches" that does not "exceed zero degrees Celsius at any point during the calendar year." A Corps regulation, which is not challenged here, provides that:

> The term wetlands means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.

33 C.F.R. § 328.3(b). To identify wetlands under this regulation, the Corps uses its 1987 Wetlands Delineation Manual ("Manual"). *See* Energy and Water Development Appropriations Act, Pub. L. No. 102-377, 106 Stat. 1315, 1324 (1992); *United States v. Deaton*, 332 F.3d 698, 712 (4th Cir. 2003).

The Manual explains that wetlands have the three "general diagnostic environmental characteristics" of vegetation, soil and hydrology. Manual ¶ 26(b). Generally, "evidence of a minimum of one positive wetland indicator from each parameter (hydrology, soil, and vegetation) must be found in order to make a positive wetland determination." *Id.* ¶ 26(c). Fairbanks alleged that its property lacks wetlands hydrology, because it is not "periodically inundated" and does not have "saturated soils during the growing season." *Id.* ¶ 46. The Manual defines "growing season" as "[t]he portion of the year when soil temperatures at 19.7 in. below the soil surface are higher than biologic zero (5° C)" and notes that "[f]or

ease of determination this period can be approximated by the number of frost-free days." *Id.* at App. A. Fairbanks asserted that the Corps' jurisdictional determination improperly relied on a special definition of "growing season," which Fairbanks calls the "Alaska Rule," inconsistent with the Manual's definition. The Alaska Rule states that the frost-free period based on a "28 degree air temperature" best fits the "observed growing season in most parts of [Alaska]." *See* Army Corps of Engineers, Alaska District, Special Public Notice 03-05 (July 25, 2003). By using the Alaska Rule, Fairbanks claimed, the Corps could establish a growing season even when a property is underlain by shallow permafrost, and never has a subsurface soil temperature higher than biologic zero.[2] Consequently, the Corps' finding that Fairbanks' property was a wetland subject to CWA regulatory jurisdiction was erroneous.

The district court granted the Corps' motion for judgment on the pleadings, concluding that the approved jurisdictional determination did not constitute final agency action under the APA, that Fairbanks' challenge was unripe and that the CWA statutorily precluded judicial review. Fairbanks timely appealed.

STANDARD OF REVIEW

"We review a judgment dismissing a case on the pleadings de novo." *Dunlap v. Credit Prot. Ass'n, L.P.*, 419 F.3d 1011, 1012 n.1 (9th Cir. 2005) (per curiam).

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[2] Fairbanks concedes that the Corps' rescission of the Alaska Rule in March 2006 moots its claim that the Alaska Rule was promulgated without compliance with the APA's notice-and-comment procedures and does not challenge the district court's entry of judgment as to that claim.

"A judgment on the pleadings is properly granted when, taking all the allegations in the pleadings as true, the moving party is entitled to judgment as a matter of law." *Id.* (internal quotation marks omitted). "We review de novo the district court's determination that it lacked subject matter jurisdiction. We therefore do not defer to the agency's position on whether agency action is final." *Or. Natural Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 979 n.1 (9th Cir. 2006) (internal citations omitted).

DISCUSSION

[1] As a matter of first impression, we hold that the Corps' issuance of an approved jurisdictional determination finding that Fairbanks' property contained waters of the United States did not constitute final agency action under the APA for purposes of judicial review.[3] "As a general matter, two conditions must be satisfied for agency action to be final: First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal citations and quotation marks omitted). The approved jurisdictional determination represented the Corps' definitive

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[3] This question has not been addressed by any published decision of the courts of appeals. *See Greater Gulfport Prop., LLC v. U.S. Army Corps of Eng'rs*, 194 F. App'x 250 (5th Cir. 2006) (unpublished) (holding that district court lacked jurisdiction to review Corps' approved jurisdictional determination); *Comm'rs of Pub. Works v. United States*, 30 F.3d 129 (4th Cir. 1994) (unpublished) (same).

administrative position that Fairbanks' property contained wetlands. But, as we shall explain, it did not " 'impose an obligation, deny a right, or fix some legal relationship.'" *Ukiah Valley Med. Ctr. v. FTC*, 911 F.2d 261, 264 (9th Cir. 1990) (quoting *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948)). Because finality is a jurisdictional requirement to obtaining judicial review under the APA, the district court correctly dismissed Fairbanks' action. *See Or. Natural Desert Ass'n*, 465 F.3d at 982. We do not reach the issues of ripeness and statutory preclusion of judicial review.

I.

We agree with Fairbanks that an approved jurisdictional determination upheld in the Corps' administrative appeal process "mark[s] the consummation of the agency's decisionmaking process" for determining whether the Corps conceives a property as subject to CWA regulatory jurisdiction. There is no question that the Corps has asserted its ultimate administrative position regarding the presence of wetlands on Fairbanks' property "on the factual circumstances upon which the [determination is] predicated[.]" *See Alaska Dep't of Envtl. Conservation v. EPA*, 244 F.3d 748, 750 (9th Cir. 2001) ("*Alaska I*"); *see also Alaska Dep't of Envtl. Conservation v. EPA*, 298 F.3d 814, 818 (9th Cir. 2002), *aff'd* 540 U.S. 461, 483 (2004) ("*Alaska II*"). The approved jurisdictional determination states on its face that it "is valid for a period of five (5) years" and that the Corps' position would change only if "new

information supporting a revision is provided."[4] It is "devoid of any suggestion that it might be subject to subsequent revision" or "further agency consideration or possible modification." *See City of San Diego v. Whitman*, 242 F.3d 1097, 1102 (9th Cir. 2001) (quoting *Ontario v. EPA*, 912 F.2d 1525, 1532 (D.C. Cir. 1990), and *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 436-37 (D.C. Cir. 1986)).

[2] By regulation, the Corps has established a formal procedure for "[a]ffected part[ies]" to solicit its official position about the scope of CWA regulatory jurisdiction. *See* 33 C.F.R. § 331.2. A jurisdictional determination is a "written Corps determination that a wetland . . . is subject to regulatory jurisdiction under [the CWA]." *Id.*; *see also* Jurisdictional Determinations, Corps Regulatory Guidance Letter 08-02, at 1 (June 26, 2008) ("An approved [jurisdictional determination] is an official Corps determination that jurisdictional [waters under the CWA] are either present or absent on a particular site."). After the district engineer's approved jurisdictional determination has been upheld by the division engineer, no further administrative appeal is

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[4] *Alaska I* forecloses the Corps' contention that an approved jurisdictional determination cannot satisfy *Bennett*'s first prong because the Corps might alter its position if the physical condition of Fairbanks' property changed. We had no difficulty there regarding the EPA's findings as its "last word" about the contested issue because the agency's position was "unalterable": it "would change only if the circumstances surrounding the [generator's construction] changed." *Alaska I*, 244 F.3d at 750; *see also Gen. Elec. Co. v. EPA*, 290 F.3d 377, 380 (D.C. Cir. 2002) ("If the possibility . . . of future revision in fact could make agency action non-final as a matter of law, then it would be hard to imagine when any agency rule . . . would ever be final . . . .").

possible. *See* 33 C.F.R. § 331.9.[5] At that point, the approved jurisdictional determination is deemed to be "final Corps agency action" and a "final Corps decision" for administrative purposes. *Id.* § 320.1(a)(2), (a)(6) (emphasis added).[6] The regulations thus delimit the stopping point of the Corps' decisionmaking process for the issuance and review of jurisdictional determinations. An approved jurisdictional determination upheld on administrative appeal is the agency's "last word" on whether it views the property as a wetland subject to regulation under the CWA. *See Sierra Club v. U.S. NRC*, 825 F.2d 1356, 1362 (9th Cir.

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[5] With limited exceptions, the Corps' district engineers are authorized to "issue formal determinations concerning the applicability of the Clean Water Act . . . to . . . tracts of land . . . ." 33 C.F.R. § 320.1(a)(6); *but cf. id.* § 325.9. The district engineer's jurisdictional determination is subject to administrative appeal. *Id.* § 320.1(a)(2). In determining the appeal, the reviewing officer is to "conduct an independent review of the administrative record to address the reasons for the appeal cited by" the appellant. *Id.* § 331.3(b)(2). The reviewing officer must render a decision within 12 months of the filing of a request for appeal, *id.* § 331.8, "document his decision on the merits of the appeal in writing," *id.* § 331.9(b), and file it "in the administrative record for the project," thereby concluding the administrative appeal process, *id.* § 331.9(c).

[6] An agency's characterization of its own action as final is not "determinative" of our own finality analysis under the APA, *Blincoe v. FAA*, 37 F.3d 462, 464 (9th Cir. 1994) (per curiam), though it does "provide [ ] an indication of the nature of the [agency's] action," *City of San Diego*, 242 F.3d at 1101 n.6. The Corps has expressly declined to address "in . . . rule-making when a [jurisdictional determination] should be considered a final agency action" for purposes of judicial review. *See* Final Rule Establishing an Administrative Appeal Process for the Regulatory Program of the Corps of Engineers, 65 Fed. Reg. 16,486, 16,488 (Mar. 28, 2000).

1987). No further agency decisionmaking on that issue can be expected, a clear indication that the first prong of the *Bennett* finality test is satisfied. *See id.*

The Corps argues that an approved jurisdictional determination merely helps parties "determine where they stand on potential permitting issues" and "necessarily entails the possibility of further administrative proceedings," like permit applications. As such, the determination is "only [a] step [ ] leading to an agency decision, rather than the final action itself." *See Ecology Ctr., Inc. v. U.S. Forest Serv.*, 192 F.3d 922, 925 (9th Cir. 1999). Fairbanks correctly responds that this argument "conflate[s] one . . . decision with a future yet distinct administrative process." The Corps' regulations throughout treat jurisdictional determinations and permitting decisions as discrete agency actions.[7] Notably, jurisdictional determinations "do not include determinations that a particular activity requires a . . . permit." 33 C.F.R. § 331.2. The Corps' reliance on *City of San Diego* is misplaced in view of the agency's provision of a formal procedure for acquiring its settled views about the scope of CWA jurisdiction outside of and apart from the permitting process. *Cf. City of San Diego*, 242 F.3d at 1101 (reasoning that letter did not mark consummation of decisionmaking process because it was only "upon completion of the permit appeal

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[7] *See, e.g.*, 33 C.F.R. § 331.2 (identifying approved jurisdictional determinations, permit denials and declined permits as categories of "appealable action[s]"); *id.* § 331.3(a)(1) (allowing division engineer to delegate authority when reviewing jurisdictional determinations, but not permit decisions); *see also* Corps Regulatory Guidance Letter 08-02, at 2-3 (explaining that approved jurisdictional determination need not be secured before initiating permitting process).

process" that agency would decide applicability of statute). That Fairbanks might later decide to initiate some *other* Corps process after obtaining the approved jurisdictional determination does not detract from the definiteness of the determination itself.

[3] An approved jurisdictional determination announces the Corps' considered, definite and firm position about the presence of jurisdictional wetlands on Fairbanks' property at the time it is rendered. Accordingly, we conclude that it marks the consummation of the agency's decisionmaking process as to that issue.

II.

[4] Although Fairbanks is correct that the first *Bennett* requirement is satisfied, the second is not. We hold that the Corps' approved jurisdictional determination finding that Fairbanks' property contained wetlands subject to CWA regulatory jurisdiction is not an "action . . . by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett*, 520 U.S. at 178; *see also Or. Natural Desert Ass'n*, 465 F.3d at 987 (examining "whether [challenged action] has any legal effect that would qualify it as a final agency action under *Bennett*'s second finality requirement"). From this it follows that judicial review under the APA is unavailable.

[5] Fairbanks' rights and obligations remain unchanged by the approved jurisdictional determination. It does not itself command Fairbanks to do or forbear from anything; as a bare statement of the agency's opinion, it can be neither the subject of "immediate compliance" nor of defiance. *See FTC v.*

Standard Oil Co., 449 U.S. 232, 239-40 (1980). Up to the present, the Corps has "expresse[d] its view of what the law requires" of Fairbanks without altering or otherwise fixing its legal relationship. *See AT & T v. EEOC*, 270 F.3d 973, 975 (D.C. Cir. 2001). This expression of views lacks the "status of law or comparable legal force." *See Ukiah Valley Med. Ctr.*, 911 F.2d at 264.[8] In any later enforcement action, Fairbanks would face liability only for noncompliance with the CWA's underlying statutory commands, not for disagreement with the Corps' jurisdictional determination. *See* 33 U.S.C. § 1319(b)-(c), (g) (providing criminal, civil and administrative penalties for violation of the CWA, but not referring to approved jurisdictional determinations); *cf. Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236, 1255-57 (11th Cir. 2003) (reasoning that Clean Air Act compliance orders have status of law because statute "undeniably authorizes[s] . . . penalties based solely upon noncompliance" with them).

[6] At bottom, Fairbanks has an obligation to comply with the CWA. If its property contains waters of the United States, then the CWA requires Fairbanks to obtain a Section 404 discharge permit; if its property

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[8] *Cf., e.g., Alaska II*, 540 U.S. at 481 n.10 ("[T]he *stop-construction order* imposed 'new legal obligations' . . . .") (emphasis added); *Pub. Util. Dist. No. 1 of Snohomish County v. Bonneville Power Admin.*, 506 F.3d 1145, 1152 (9th Cir.2007) ("[T]hey created *new* benefits and obligations . . . .") (emphasis added); *Or. Natural Desert Ass'n*, 465 F.3d at 985 n.10 (recognizing "substantive legal constraints imposed" by the challenged agency action); *Alaska I*, 244 F.3d at 750 (explaining that the parties bringing suit "would be subject to criminal and civil penalties for the violation of [the agency's orders], *as well as* for the violation of the" Clean Air Act itself) (emphasis added).

does not contain those waters, then the CWA does not require Fairbanks to acquire that permit. In either case, Fairbanks' legal obligations arise directly and solely from the CWA, and not from the Corps' issuance of an approved jurisdictional determination. *See Gallo Cattle Co. v. USDA*, 159 F.3d 1194, 1199 (9th Cir. 1998) (agency decision not final agency action because potential legal consequences flowed only from the plaintiff's "disregard of its statutory obligation"). Whether Fairbanks' property is a jurisdictional wetland (i.e., contains waters of the United States) depends on its "vegetation, soil and hydrology"—the land is what and where it is. The Corps does not alter that physical reality or the legal standards used to assess that reality simply by opining that a particular site contains waters of the United States. *See Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 16 (D.C. Cir. 2005) (agency action that "left the world just as it found it . . . cannot be fairly described as implementing, interpreting, or prescribing law or policy") (internal quotation marks omitted).

In withholding judicial review of the Corps' approved jurisdictional determination, we do not impair Fairbanks' ability to contest the existence of CWA regulatory jurisdiction. *See Indus. Customers of Nw. Utils. v. Bonneville Power Admin.*, 408 F.3d 638, 647 (9th Cir. 2005); *see also Nat'l Ass'n of Home Builders*, 415 F.3d at 15. It is settled law that the federal courts have the final say on the scope of the CWA.[9] In exercising that authority, we would not give

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[9] *See, e.g., Baccarat Fremont Developers, LLC v. U.S. Army Corps of Eng'rs*, 425 F.3d 1150, 1153 (9th Cir.2005) (reviewing CWA regulatory jurisdiction in context of challenge to discharge permit's

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the government's position that CWA regulatory jurisdiction exists any particular deference simply because the Corps' views on the matter were formulated in the context of an approved jurisdictional determination rather than, for example, a permit application or enforcement proceeding.

Despite all this, Fairbanks urges that the Corps' approved jurisdictional determination has three legal consequences: it prevents Fairbanks from claiming in mitigation that it had acted with good faith; it effectively requires Fairbanks to submit to the CWA's permitting regime before proceeding with construction; and it deprives Fairbanks of a "negative" jurisdictional determination, which might have been relied upon as a defense to enforcement action.[10] We do not consider

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[9] (...continued)
mitigation requirements); *United States v. Phillips*, 367 F.3d 846, 854-55 (9th Cir. 2004) (reviewing CWA regulatory jurisdiction in context of motion to dismiss indictment); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001) (reviewing CWA regulatory jurisdiction in context of citizen suit).

[10] Fairbanks also contends that an approved jurisdictional determination is judicially reviewable like an interpretive rule that has a "substantial impact on the rights of individuals," *Am. Postal Workers Union v. U.S. Postal Serv.*, 707 F.2d 548, 560 (D.C. Cir. 1983), or the denial of a permit authorizing an otherwise proscribed activity, *John Doe, Inc. v. DEA*, 484 F.3d 561, 566-67 (D.C. Cir. 2007). These arguments assume the desired conclusion: such agency actions are judicially reviewable only insofar as they have tangible legal consequences or otherwise alter the legal relationship between the parties. *See Oregon v. Ashcroft*, 368 F.3d 1118, 1120 (9th Cir. 2004) (holding that interpretive rule "is a final determination for jurisdictional purposes because the rule impos[es] obligations and sanctions in the event of violation [of its provisions]") (internal quotation marks omitted and alteration in original). By contrast, the Corps' approved jurisdictional (continued...)

these arguments persuasive and shall address each in turn.

[7] "In determining the amount of a civil penalty the court shall consider . . . any good-faith efforts to comply with the applicable requirements [of the CWA] . . . ." 33 U.S.C. § 1319(d) (emphasis added). As even the Corps recognizes, an approved jurisdictional determination could "eventually be evidence on the issue of whether a particular course of conduct was undertaken in good or bad faith." But the possibility that Fairbanks might someday face a greater risk of increased fines should it proceed without regard to the Corps' assertion of jurisdiction does not constitute a legal consequence of the approved jurisdictional determination. *Cf. City of Fremont v. FERC*, 336 F.3d 910, 914 (9th Cir. 2003) ("Because the FERC orders attach *legal* consequences to the future . . . proceedings, they satisfy the finality prong of our analysis.") (emphasis added). Section 1319(d) does not mention jurisdictional determinations, much less assign them any particular evidentiary weight; thus, any difficulty Fairbanks might face in establishing good faith flows not from the legal status of the Corps' determination as agency action, but instead from the practical effect of Fairbanks having been placed on notice that construction might require a Section 404 permit. *See Ctr. for Auto Safety v. NHTSA*, 452 F.3d 798, 811 (D.C. Cir. 2006); *Nat'l Ass'n of Home Builders*, 415 F.3d at 15. The Corps' approved jurisdictional

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[10] (...continued)
determination imposes no new or additional legal obligations on Fairbanks. It at most "simply 'reminds' affected parties of existing duties" imposed by the CWA itself and commands nothing of its own accord. *See Citizens to Save Spencer County v. EPA*, 600 F.2d 844, 876 n.153 (D.C. Cir. 1979).

determination has no more legal effect on Fairbanks' ability eventually to assert a good faith defense than would, for example, a report by a private wetlands consultant informing Fairbanks that its property contained wetlands.

[8] Fairbanks' second argument, that the Corps' approved jurisdictional determination "as much as requires" and "makes [Fairbanks] subject to the CWA permitting regime, an onerous administrative maze," likewise erroneously conflates a potential practical effect with a legal consequence.[11] We do agree that now that Fairbanks is on the Corps' radar screen, it is at least plausible that the probability of enforcement action if Fairbanks proceeds with construction without

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[11] We appreciate that navigating the CWA permitting process is no small task. *See Rapanos*, 547 U.S. at 721 (plurality opinion) ("The average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915 . . . ."). Yet, we must keep in mind that these are the costs of statutory compliance with the CWA. Whether or not it has an approved jurisdictional determination in hand, the owner of land that contains waters of the United States must bear those costs. Because any legal obligation to undergo the CWA permitting process does not arise from the Corps having expressed its view that Fairbanks' property is a wetland, we do not reach the Corps' argument that agency action requiring a party to participate in further agency proceedings is characteristically non-final. *Compare Hecla Mining Co. v. EPA*, 12 F.3d 164 (9th Cir. 1993) (EPA's decision to list mine as "point source[ ] discharging toxic pollutants that are responsible for impairing the achievement of water quality standards" not final agency action because it "serve[d] only to initiate proceedings" and required no action on mine's part until permitting process complete), *with Hawaiian Elec. Co. v. EPA*, 723 F.2d 1440, 1442–43 (9th Cir. 1984) (EPA's determination that generator's proposed fuel change constituted a "major modification" was final agency action because it required use of more rigorous "major modification" PSD permit review).

securing a Section 404 permit is greater than it was before it requested an approved jurisdictional determination. Not every agency "decision . . . [that] has immediate financial impact," or even "profound [economic] consequences" in the real world, is final agency action, however. *See Indus. Customers of Ne. Util.*, 408 F.3d at 646-47. Whatever Fairbanks now chooses to do, it will be no more or less in violation of the CWA than if it had never requested an approved jurisdictional determination. The approved jurisdictional determination did not augment the Corps' legal authority to pursue enforcement action. To the contrary, Fairbanks' legal obligations—including any obligation to pursue a Section 404 dredge and fill material discharge permit—have always arisen solely on account of the CWA. *See Gallo Cattle*, 159 F.3d at 1199.

[9] Fairbanks' final point is a non sequitur. It contends that because a Corps determination that a property does not contain "waters of the United States" has legal consequences, a Corps determination that a property does contain jurisdictional waters likewise has legal consequences.[12] Implicit in Fairbanks'

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[12] Fairbanks may be correct that an official Corps statement that a property is not a jurisdictional wetland subject to the CWA's permitting requirements could be the basis for an estoppel defense. When an authorized government official tells the defendant that a course of action is legal and the defendant reasonably relies to its detriment on that erroneous representation, then fairness and due process may prohibit the state from punishing the defendant for that unlawful conduct. *See United States v. Brebner*, 951 F.2d 1017, 1024-25 (9th Cir. 1991); *United States v. Tallmadge*, 829 F.2d 767, 773 (9th Cir. 1987). Courts have recognized that finality can result "if the language of the document is such that private parties can rely on it as a . . .

(continued..)

argument is the dubious premise that if an agency's decisionmaking process has multiple outcomes and any of these outcomes is judicially reviewable, then all of them must be judicially reviewable. We have not been directed to any authority recognizing this as a principle of administrative law. Unsurprisingly so: the law is replete with situations when the availability of judicial review turns on the effect of the agency's particular decision. Agency action that does not cause injury in fact is not judicially reviewable due to lack of standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). And agency action that does not "impose an obligation, deny a right, or fix some legal relationship" is not judicially reviewable due to lack of finality. *Ukiah Valley Med. Ctr.*, 911 F.2d at 264. Whether a Corps finding that a property is not subject to regulatory jurisdiction under the CWA would constitute final agency action is beside the point here, where Fairbanks seeks judicial review of a Corps' finding that its property is subject to CWA regulatory jurisdiction. A negative finding would effectively assure Fairbanks that the Corps would not later be able to fault Fairbanks' failure to seek a permit. The affirmative finding simply puts Fairbanks on notice that the Corps believes a permit is necessary if Fairbanks decides to proceed with its project.

CONCLUSION

[10] We do not have jurisdiction to review the Corps' approved jurisdictional determination finding that Fairbanks' property contains wetland subject to CWA regulatory jurisdiction. Although the approved

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[12] (...continued)
safe harbor by which to shape their actions." *Gen. Elec. Co. v. EPA*, 290 F.3d at 383 (internal quotation marks omitted).

jurisdictional determination is the Corps' official, last word about its view of the status of Fairbanks' property, the Corps' view does not impose an obligation, deny a right or fix some legal relationship. Accordingly, it is not final agency action under the APA.

AFFIRMED.

Appendix B–1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

FAIRBANKS NORTH STAR BOROUGH, Plaintiff, vs. UNITED STATES ARMY CORPS OF ENGINEERS; BRIGADIER GENERAL JOHN W. PEABODY, Division Engineer; and COLONEL KEVIN J. WILSON, Commander of the Alaska Engineer District, Defendants.	Case No. 4:06-cv-0026-RRB **ORDER GRANTING DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS (DOCKET 16)**

I. INTRODUCTION

At Docket 16 are Defendants United States Army Corps of Engineers, *et al.* (hereinafter collectively referred to as the "Corps"), with a Motion for Judgment on the Pleadings.[1] In essence, the Corps argues the

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[1] The Corps' motion is brought pursuant to Fed. R. Civ. P. 12(c), which provides:

> After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one far

(continued...)

instant matter should be dismissed because the Court lacks the requisite subject matter jurisdiction necessary to hear the same.[2] More specifically, the Corps contends: (1) the regulatory jurisdictional determination at issue is *not* a "final agency action" subject to review under the Administrative Procedure Act ("APA"); (2) the matter is not ripe; (3) the Clean Water Act ("CWA") precludes judicial review of the regulatory jurisdictional determination; (4) Plaintiff Fairbanks North Star Borough ("North Star") lacks Article III standing to challenge Special Public Notice 2003-5; and/or (5) North Star lacks Article III standing to challenge the Corps' regulatory jurisdictional determination, which it alleges does not determine any rights or obligations, or have any legal consequences.[3] North Star opposes at Docket 21 and contends: (1) the regulatory jurisdictional determination constitutes "final agency action"; (2) the jurisdictional determination is ripe for judicial review; (3) the CWA does not preclude review of the jurisdictional determination; and (4) North Star has Article III

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[1] (...continued)
summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

[2] Docket 17 at 2.

[3] *Id.* at 2-3.

standing to challenge the jurisdictional determination.[4] The Court disagrees.[5]

II. FACTS

"The property at issue in this case comprises 2.1 acres which [North Star] wishes to develop into playgrounds, athletic fields, restrooms, concession, and related structures."[6]

> On October 26, 2005, North Star requested that the Corps make a jurisdictional determination of the property.[7] On November 3, 2005, the Corps issued a preliminary jurisdictional determination

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[4] Docket 21 at 1. Inasmuch as the parties agree North Star lacks Article III standing to challenge Special Public Notice 2003-05, which the Corps rescinded five months before [North Star] filed its Complaint, *see* Docket 24 at 2 n.1, North Star's challenge to Special Public Notice 2003-05 is hereby **DISMISSED** as moot. *See also* Docket 21 at 2 n.1.

[5] Inasmuch as the Court concludes the parties have submitted memoranda thoroughly discussing the law and evidence in support of their positions, it further concludes oral argument is neither necessary nor warranted with regard to the instant matter. *See Mahon v. Credit Bureau of Placer County Inc.*, 171 F.3d 1197, 1200 (9th Cir. 1999) (explaining that if the parties provided the district court with complete memoranda of the law and evidence in support of their positions, ordinarily oral argument would not be required). For this reason, North Star's Request for Oral Argument at **Docket 25** was **DENIED**. *See* Docket 26.

[6] Docket 21 at 3.

[7] "When requested, the Corps can make a jurisdictional determination to decide whether a putative 'water of the United States' is within its regulatory jurisdiction under the CWA and thus whether a permit is even necessary." Docket 17 at 5 (citing 33 C.F.R. §§ 320.1(a)(6), 325.9).

> concluding that the property contains "waters of the United States" subject to the Corps' jurisdiction under the CWA.[8]

North Star subsequently requested a final determination. "On December 13, 2005, the Corps issued a positive final jurisdictional determination, finding that [North Star's] entire parcel contains waters of the Untied States."[9]

> On February 8, 2006, North Star filed an administrative appeal of the jurisdictional determination. On May 25, 2006, the Corps found that the appeal did not have merit.[10] To date, North Star has never applied for a permit from the Corps to conduct activities on the property. In addition, the United States has not initiated any action to enforce the CWA on the property.[11]

III. STANDARD OF REVIEW

A party is entitled to judgment on the pleadings pursuant to Rule 12(c) when "taking all allegations in the pleading as true, the moving party is entitled to

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[8] Docket 17 at 6 (citations omitted).

[9] Docket 21 at 3-4 (citation omitted).

[10] "On May 26, 2006, the Corps's [sic] then appellate officer, Brigadier General John W. Peabody, denied the appeal and upheld the Corps's [sic] jurisdictional determination." *Id.* at 4 (citation omitted).

[11] Docket 17 at 6 (citations omitted).

judgment as a matter of law."[12] The court views the alleged facts and all inferences in the light most favorable to the nonmoving party.[13] If allegations conflict, the court accepts the nonmoving party's allegations as true.[14] The moving party must establish beyond doubt that the nonmoving party can establish no set of facts supporting its claim before the court may grant a Rule 12(c) motion.[15]

IV. DISCUSSION

A. The jurisdictional determination does not constitute final agency action.

"The APA limits judicial review to 'final agency action.'"[16] In *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997),

> [T]he Supreme Court found that two conditions must be satisfied for agency action to be final: (1) "the action must mark the 'consummation' of the agency's decision making process"; and (2) "the action must be one by which 'rights or obligations have been

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[12] *McGann v. Ernst & Young*, 102 F.3d 390, 392 (9th Cir. 1996), *cert. denied*, 520 U.S. 1181, 117 S. Ct. 1460 (1997). *See also Geraci v. Homestreet Bank*, 347 F.3d 749, 751 (9th Cir. 2003) ("A motion for judgment on the pleadings should be granted where it appears the moving party is entitled to judgment as a matter of law.").

[13] 5C Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* § 1368 (3d ed. 2004).

[14] *Id.*

[15] *Enron Oil Trading & Transp. Co. v. Walbrook Ins. Co., Ltd.*, 132 F.3d 526, 529 (9th Cir. 1997).

[16] Docket 17 at 10 (citations omitted).

> determined' or from which 'legal consequences will flow.'"[17]

The jurisdictional determination at issue merely informed North Star where it stood with respect to potential permitting issues. As a result, the Court concludes it "did not mark the consummation of the Corps' decision making process."[18] Moreover, it did not affect the legal rights and/or obligations of the parties. Indeed, "the legal rights and/or obligations of the parties were precisely the same the day after the jurisdictional determination was issued as they were the day before."[19] Consequently, the Court further concludes the "jurisdictional determination is not a final agency action subject to APA review."[20] For similar reasons, the matter is not ripe.

B. The jurisdictional determination is not ripe for judicial review.

Interpreting its own rules and regulations, the Corps has declared,

> In the past, a number of courts have held that jurisdictional determinations are not ripe for review until a landowner who disagrees with a [jurisdictional determination] has gone through the permitting process. The Federal

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[17] *St. Andrews Park, Inc. v. U.S. Dept. of Army Corps of Engineers*, 314 F. Supp. 2d 1238 (S.D. Fla. 2004).

[18] Docket 17 at 11.

[19] *St. Andrews Park*, 314 F. Supp. 2d at 1245 (citation omitted).

[20] Docket 17 at 10 (citations omitted) (emphasis added).

> Government believes this is the correct result . . . .[21]

The Corps further rationalized:

> Physical circumstances can change over time, and the scope of regulatory jurisdiction when a [jurisdictional determination] is initially performed might be different from the scope of jurisdiction when a permit application is reviewed or when an enforcement action is taken.

As a result, and because the Court "owes substantial deference to an agency's reading of its own regulations,"[22] North Star's challenge to the jurisdictional determination is not ripe.[23] "Furthermore, even if the jurisdictional determination were a final agency action and ripe for review, the APA's waiver of sovereign immunity does not apply when 'statutes preclude judicial review.'"[24]

C. The CWA precludes review of all pre-enforcement agency actions, including jurisdictional determinations.

Indeed, the Corps "initial determination that it has authority to either require permitting[,] or issue

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[21] 65 Fed. Reg. at 16488 (March 28, 2000).

[22] *Zurich American Ins. Co. v. Whittier Properties, Inc.*, 356 F.3d 1132, 1137 (9th 2004).

[23] "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" Docket 17 at 14 (quoting *Texas v. U.S.*, 523 U.S. 296, 300 (1998) (citation omitted)).

[24] Docket 17 at 15 (citing 5 U.S.C. § 701(a)(1)).

orders in the absence of a permit application[, are] unreviewable."[25]

V. CONCLUSION

For these reasons, and for additional reasons more clearly articulated within the relevant pleadings,[26] the Corps' Motion for Judgment on the Pleadings at **Docket 16** is hereby **GRANTED**. Notwithstanding, inasmuch as nothing determined herein prevents North Star from refiling once final agency action has been taken and all administrative remedies have been exhausted, the matter is **DISMISSED WITHOUT PREJUDICE**.

ENTERED this 18th day of May, 2007.

S/RALPH R. BEISTLINE
UNITED STATES DISTRICT JUDGE

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[25] Docket 24 at 14 (quoting *Rueth v. U.S. E.P.A.*, 13 F.3d 227, 229 (7th Cir. 1993) (quoting *Rueth Development Co., Inc. v. U.S. E.P.A.*, 1992 WL 560944, at *2 (N.D. Ind. 1992)); and citing *Child v. U.S.*, 851 F. Supp. 1527, 1533 (D. Utah 1994) (holding that plaintiff had no right to pre-enforcement review of jurisdictional determination by the Corps)). Although not authoritative, the Court finds these cases to be particularly persuasive. *See also Baccarat Fremont Developers, LLC v. U.S. Army Corps of Engineers*, 425 F.3d 1150, 1153 (9th Cir. 2005) ("[Plaintiff] signed the permit, [thus] preserving the right to seek judicial review of the Corps' jurisdictional determination").

[26] For example, the Corps argument regarding the *Leedom* doctrine is particularly persuasive. As a result, the Court finds that the "severely limited circumstances" necessary to invoke the *Leedom* doctrine are not present in the instant matter. *See Leedom v. Kyne*, 358 U.S. 184 (1958); and *Board of Governors of Federal Reserve System v. MCorp Financial, Inc.*, 502 U.S. 32, 42-44 (1991).

Appendix C–1

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FAIRBANKS NORTH STAR BOROUGH, Plaintiff - Appellant, v. U.S. ARMY CORPS OF ENGINEERS; JOHN W. PEABODY; KEVIN J. WILSON, Defendants - Appellees.	No. 07-35545 D.C. No. CV-6-0026-F-RRB ORDER FILED Nov. 20, 2008

Before: D. NELSON, TASHIMA and FISHER, Circuit Judges.

Judge Fisher has voted to deny the petition for rehearing en banc, and Judges D. Nelson and Tashima so recommend.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc, filed October 23, 2008, is **DENIED**.

No. 08-1052

In the Supreme Court of the United States

FAIRBANKS NORTH STAR BOROUGH, PETITIONER

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Army Corps of Engineers' determination that petitioner's property contains "waters of the United States" protected by the Clean Water Act constitutes "final agency action" subject to judicial review under the Administrative Procedure Act.

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In the Supreme Court of the United States

No. 08-1052

FAIRBANKS NORTH STAR BOROUGH, PETITIONER

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A20) is reported at 543 F.3d 586. The opinion of the district court (Pet. App. B1-B8) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 2008. A petition for rehearing was denied on November 20, 2008 (Pet. App. C1). The petition for a writ of certiorari was filed on February 13, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 301(a) of the Clean Water Act (CWA) prohibits the "discharge of any pollutant"—defined as the addition of any pollutant to the "waters of the United

States" from any point source—except "as in compliance with" specified provision of the CWA. 33 U.S.C. 1311(a), 1362(7), 1362(12). The CWA allows discharges under two complementary permitting provisions. Section 404 authorizes the Army Corps of Engineers (Corps) to issue a permit "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. 1344(a) and (d). Section 402 authorizes the Environmental Protection Agency (EPA) to issue a permit for the discharge of any pollutant other than dredged or fill material. 33 U.S.C. 1342.

The Corps' regulations authorize (but do not require) the Corps, upon a landowner's written request, to provide the agency's view on whether particular property contains "waters of the United States" within the agency's regulatory jurisdiction under Section 404 of the CWA. See 33 C.F.R. 320.1(a)(6), 331.2; 33 C.F.R. Pt. 331 App. C. After the Corps issues an "approved" jurisdictional determination, the landowner may pursue an administrative appeal of that determination within the Corps. See 33 C.F.R. Pt. 331. Such jurisdictional determinations "do not include determinations that a particular activity requires a * * * permit." 33 C.F.R. 331.2.

Neither the CWA nor its implementing regulations require that a landowner obtain a jurisdictional determination. Whether or not it obtains such a determination, a landowner planning to discharge dredged or fill material has two options. First, the landowner may apply for a Section 404 permit from the Corps. See 33 U.S.C. 1344; 40 C.F.R. Pt. 230; 33 C.F.R. Pts. 323, 325. The agency's final permitting decision, including the Corps' determination whether the property at issue contains waters protected by the CWA, is then subject to judicial review under the Administrative Procedure Act (APA),

5 U.S.C. 701 *et seq.* See, *e.g.*, *Carabell* v. *United States Army Corps of Eng'rs*, 391 F.3d 704, 706-707 (6th Cir. 2004), vacated on other grounds, 547 U.S. 715 (2006).

Alternatively, the landowner may proceed with its discharge without a Section 404 permit and risk enforcement proceedings. If the government determines that a completed or ongoing discharge violates the CWA, it may take administrative action, including issuance of a "cease-and-desist" order, a compliance order, or both. See 33 U.S.C. 1319(a), 1344(s); 33 C.F.R. 326.3(c). In addition, the government may bring an enforcement action in district court to obtain injunctive and other relief. 33 U.S.C. 1319(b); 33 C.F.R. 326.5. At that time, the discharger may raise any applicable defenses, including the contention that its conduct did not violate the CWA because it did not involve a discharge into "waters of the United States." See, *e.g.*, *United States* v. *Deaton*, 332 F.3d 698, 701-702 (4th Cir. 2003), cert. denied, 541 U.S. 972 (2004).

2. Petitioner owns and wishes to develop approximately 2.1 acres of property in Fairbanks, Alaska. Pet. App. A3. In October 2005, petitioner asked the Corps for the agency's determination of whether that property contains waters protected by the CWA. *Id.* at A3-A4. The Corps issued a "preliminary" jurisdictional determination concluding that the property contains "waters of the United States" subject to the Corps' regulatory authority under the CWA. *Id.* at A4. Petitioner then requested an "approved" jurisdictional determination from the Corps. In response, the Corps explained that, based on its review of the information available to it, the entire parcel contained "waters of the United States." *Ibid.* Petitioner then filed an administrative appeal of the ju-

risdictional determination, which the Corps denied on the merits. *Ibid.*

Petitioner has never applied for a permit from the Corps to develop its property, nor is there any indication in the record that it has engaged in discharges without a permit based on its view that the property does not contain waters protected by the CWA. Instead, petitioner brought suit in federal district court seeking vacatur of the Corps' jurisdictional determination. Pet. App. A4-A5.

3. The district court granted the Corps' motion for judgment on the pleadings and dismissed petitioner's complaint (without prejudice) for lack of jurisdiction. Pet. App. B1-B8.

a. The district court found that the Corps' jurisdictional determination was not subject to judicial review pursuant to the APA because it was not "final agency action" under *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997). Pet. App. B5-B6. The court held that the Corps' determination neither marked the consummation of the agency's decisionmaking process nor affected the legal rights or obligations of the parties. *Id.* at B6. The court explained that the determination "merely informed [petitioner] where it stood with respect to potential permitting issues," and that "the legal rights and/or obligations of the parties were the same the day after the jurisdictional determination was issued as they were the day before." *Ibid.* (citation omitted).

b. The district court held, in the alternative, that petitioner's lawsuit was not ripe. Pet. App. B6-B7. The court agreed with the Corps that challenges to the agency's jurisdictional determinations are not ripe for judicial review until the property owner who disagrees with a determination has completed the permitting pro-

cess or is subject to an enforcement action. *Ibid.* The court also explained that both the physical and legal circumstances on which a jurisdictional determination is based can change over time. *Id.* at B7.

c. The district court held that even if the Corps' jurisdictional determination were "final agency action" and ripe for review, the APA does not apply when another statute precludes judicial review. Pet. App. B7-B8. The court concluded that the CWA precludes review of all pre-enforcement actions by the Corps, including jurisdictional determinations. *Id.* at B7-B8 & n.25 (citing, *e.g.*, *Rueth* v. *United States EPA*, 13 F.3d 227, 229 (7th Cir. 1993), and *Child* v. *United States*, 851 F. Supp. 1527, 1533 (D. Utah 1994) (mem.)).

4. The court of appeals affirmed. Pet. App. A1-A20. The court held that the Corps' jurisdictional determination was not "final agency action" subject to judicial review under the APA. *Id.* at A7. In reaching that conclusion, the court applied the two requirements for "final agency action" identified by this Court in *Bennett*. *Ibid.*

The court of appeals agreed with petitioner that the Corps' determination satisfied the first *Bennett* requirement, because "an approved jurisdictional determination upheld in the Corps' administrative appeal process 'mark[s] the consummation of the agency's decisionmaking process' for determining whether the Corps conceives a property as subject to CWA regulatory jurisdiction." Pet. App. A8 (brackets in original) (quoting *Bennett*, 520 U.S. at 178). The court concluded, however, that the Corps' jurisdictional determination did not satisfy *Bennett*'s second requirement because it "is not an 'action . . . by which rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.* at A12 (quoting *Bennett*, 520 U.S. at 178).

The court explained that petitioner's "rights and obligations remain unchanged by the approved jurisdictional determination." *Ibid.* The court noted that "[i]n any later enforcement action, [petitioner] would face liability only for noncompliance with the CWA's underlying statutory commands, not for disagreement with the Corps' jurisdictional determination." *Id.* at A13. The court also explained that its holding did not impair petitioner's ability to contest the substance of the Corps' jurisdictional determination at a later time, either by seeking judicial review of a subsequent permitting decision or by asserting the absence of CWA coverage as a defense to any enforcement action. *Id.* at A14-A15 & n.9.[1]

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. As the district court correctly held, moreover, the Corps' jurisdictional determination would not be ripe for judicial review even if it constituted "final agency action." Further review is not warranted.

1. The decision below does not conflict with any decision of this Court or another court of appeals. Two other courts of appeals appear to have considered the issue in unpublished opinions, and both reached the same conclusion as the Ninth Circuit did in this case. Pet. App. A7 n. 7 (citing *Greater Gulfport Props., LLC* v. *United States Army Corps of Eng'rs*, 194 Fed. Appx. 250 (5th Cir. 2006) (per curiam) and *Commissioners of Pub. Works* v. *United States*, 30 F.3d 129 (4th Cir. 1994)

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[1] The court of appeals did not reach the district court's alternate grounds—*i.e.*, that petitioner's challenge was not ripe and that the CWA precluded petitioner's suit for pre-enforcement review of the Corps' administrative action—for dismissing petitioner's complaint.

(table)). Petitioner identifies no conflicting decision of this Court or another court of appeals.[2]

2. Petitioner argues (Pet. 13-15) that the Corps' jurisdictional determination constituted "final agency action" that is reviewable under the APA. But petitioner does not dispute the court of appeals' articulation of the governing legal standard, including its reliance on the *Bennett* framework for identifying "final agency action." Rather, petitioner argues only that the court erred in its application of that standard (specifically, *Bennett*'s second requirement) and in its ultimate conclusion that the Corps' jurisdictional determination does not have legal consequences.[3]

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[2] Amicus National Association of Home Builders contends (at 9-12) that the decision below conflicts with court of appeals decisions concerning jurisdictional determinations under the Rivers and Harbors Appropriations Act of 1899, 33 U.S.C. 401 *et seq.* Those decisions are inapposite for at least two reasons. First, those cases deal with a different statute. Second, none of those decisions explicitly addressed the question whether the Corps' determination under the Rivers and Harbors Act constituted "final agency action" within the meaning of the APA. Rather, amicus relies on the fact that the courts in those cases decided the plaintiffs' challenges on the merits. Cf. *Webster* v. *Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").

[3] The court of appeals held that the Corps' jurisdictional determination marks the consummation of the agency's decisionmaking process and therefore satisfies the first prong of *Bennett*'s test for "final agency action." See Pet. App. A8. But while a jurisdictional determination may represent the Corps' concluded view on a particular issue of CWA coverage at a particular time, the agency's determination that specific property is or is not protected by the CWA is subject to reconsideration if, for example, the physical conditions on the site have changed by the time that a permit is sought or a discharge occurs. See 65 Fed. Reg. 16,488 (2000). When a party applies for a permit or the Corps brings an

That argument lacks merit. As the court of appeals correctly recognized, petitioner's "rights and obligations remain unchanged by the approved jurisdictional determination. It does not itself command [petitioner] to do or forbear from anything; as a bare statement of the agency's opinion, it can be neither the subject of 'immediate compliance' nor of defiance." Pet. App. A12. A property does not become more or less subject to the CWA simply because the Corps states its view on the coverage issue at a landowner's request in advance of any permit proceedings.

Petitioner identifies three potential legal consequences of a Corps jurisdictional determination that, in its view, satisfy the second prerequisite to "final agency action" identified by this Court in *Bennett*. First, petitioner contends (Pet. 11, 13) that the Corps' determination that a property does *not* contain waters of the United States could provide the basis of an estoppel defense. The premise of petitioner's argument—that a negative jurisdictional determination provides an estoppel defense against the government—is dubious. This Court has never held that such an estoppel claim could succeed against the government. See *OPM* v. *Richmond*, 496 U.S. 414, 419, 423 (1990). In any event, that is not the sort of legal consequence that *Bennett*'s second prong contemplates. The possibility that "fairness and due process" (Pet. App. A18 n.12) may ultimately prohibit the government from punishing an individual for unlawful conduct where an individual reasonably relied on a statement of a government officer that

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enforcement action, the Corps assesses the issue of CWA coverage based on the conditions at the time of the permit application or the alleged violation.

turns out to be incorrect is not a direct legal consequence of the agency action.

Second, petitioner asserts (Pet. 13-14) that a jurisdictional determination has legal consequences because it "directly and immediately alters a landowner's course of conduct" by requiring it to seek a CWA permit to continue a project. That is incorrect. As the court of appeals correctly explained, although the jurisdictional determination may have put petitioner "on the Corps' radar screen," petitioner retains the ability either to proceed with construction or to apply for a permit, and "it will be no more or less in violation of the CWA than if it had never requested an approved jurisdictional determination." Pet. App. A17-A18. Thus, petitioner may apply for a permit and contest the issue of CWA coverage if the Corps denies the application, or it may engage in pollutant discharges and raise the coverage question as a defense to any enforcement action that the government may bring. To be sure, petitioner will be subject to penalties if it proceeds without a permit and its view of CWA coverage is ultimately rejected by the courts; but that would be equally true if the Corps had never rendered a jurisdictional determination. Petitioner's obligation to obtain a permit before discharging pollutants into the "waters of the United States" is imposed by the CWA and implementing regulations, not by the Corps' jurisdictional determination.

Petitioner's mere desire to avoid the permitting process cannot transform the jurisdictional determination into judicially reviewable agency action. Petitioner does not dispute that it has the option of applying for a permit; it simply prefers not to do so. A non-final agency order, however, is one that "does not of itself adversely affect complainant but only affects his rights adversely

on the contingency of future administrative action." *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 130 (1939). This Court has recognized, for example, that an agency's complaint requiring a company to respond in an administrative adjudication was not final agency action. See *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 239-243 (1980). The burden of participating in an administrative process, even where "substantial," is different in kind and legal effect from the burden attending "final agency action." *Id.* at 242. The jurisdictional determination here does not require petitioner to do anything at all and therefore is even less final than the administrative complaint involved in *Standard Oil*.

Third, petitioner contends (Pet. 14-15) that the jurisdictional determination has legal consequences because it "substantially increases the likelihood that any civil fine assessed against the landowner will be greater than otherwise would be the case." The CWA directs a court in assessing an appropriate civil penalty to consider, *inter alia*, any good-faith efforts to comply with the CWA's requirements. 33 U.S.C. 1319(d). But the CWA's civil-penalty provision does not mention, much less assign any particular evidentiary weight to, the Corps' prior issuance of a jurisdictional determination. "[T]hus, any difficulty [petitioner] might face in establishing good faith flows not from the legal status of the Corps' determination as agency action, but instead from the practical effect of [petitioner] having been placed on notice that construction might require a Section 404 permit." Pet. App. A16. As the court of appeals explained, petitioner would be in essentially the same position if it had obtained a report from a private consultant that

concluded that the property contained waters protected by the CWA. *Id.* at A16-A17.[4]

3. Petitioner also asserts (Pet. 12, 15-18) that the court of appeals' "decision conflicts with the settled rule that CWA permit decisions are judicially reviewable." The distinction between permitting decisions and jurisdictional determinations, however, is readily apparent. The grant or denial of a permit, unlike a jurisdictional determination, determines rights or obligations and has legal consequences. The CWA makes unlawful the "discharge of any pollutant by any person" except as in compliance with other sections of the CWA, including Section 404. 33 U.S.C. 1311(a), 1344. When the Corps grants a Section 404 permit, the permit sets the conditions under which a discharge into waters of the United States may lawfully occur. If the discharger complies with the terms of the permit, it does not violate the CWA. Similarly, the denial of a Section 404 permit by

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[4] Amicus State of Alaska argues (at 16-24) that the Corps' jurisdictional determination should be appealable under the collateral order doctrine. That argument was neither pressed nor passed upon below, and it is meritless. The collateral order doctrine permits appellate courts to exercise jurisdiction under 28 U.S.C. 1291 over "'a narrow class of [federal district court] decisions that do not terminate the litigation,' but are sufficiently important and collateral to the merits that they should 'nonetheless be treated as final.'" *Will* v. *Hallock*, 546 U.S. 345, 347 (2006) (quoting *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994)). Amicus cites no case in which this Court has invoked the doctrine to allow an APA suit in district court challenging an administrative agency decision. In any event, for the reasons explained above, the jurisdictional determination is not sufficiently separate from the ultimate permitting decision, nor is it "effectively unreviewable" at a later time (because petitioner could dispute the question of CWA coverage after a final permitting decision or during a subsequent enforcement action). *Id.* at 349 (quoting *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993)).

the Corps has operative legal consequences because it forecloses that avenue by which an individual can discharge pollutants into "waters of the United States" without violating the CWA. The Corps' issuance of a jurisdictional determination entails no similar binding consequences. Rather, it is in substance an advisory opinion that reflects the agency's current assessment of the manner in which one issue bearing on a future permit application or enforcement action would likely be resolved.

4. Petitioner contends (Pet. 18-21) that the court of appeals rejected *sub silentio* its additional argument that "even if a Jurisdictional Determination would normally not be subject to judicial review, any such bar should be removed given the magnitude of regulatory overreach produced by the Corps' theory justifying regulation of [petitioner's] property." Relying on dicta in a Seventh Circuit case (*Rueth* v. *United States EPA*, 13 F.3d 227 (1993)) and on this Court's decision in *Leedom* v. *Kyne*, 358 U.S. 184 (1958), petitioner asserts (Pet. 19) that judicial review of the Corps' jurisdictional determination is available because the Corps' action "implicates the fundamental right to use and enjoy property." That argument is incorrect.

a. As an initial matter, petitioner's argument in the court of appeals was *not* that the *Rueth* dicta and the so-called *Leedom* doctrine provide an independent basis for judicial review. Instead, petitioner relied on *Rueth* and *Leedom* to assert that the district court's alternative holding—that even if the Corps' jurisdictional determination was "final agency action" for purposes of the APA, the CWA precluded judicial review (Pet. App. B7-B8)—was erroneous. See Pet. C.A. Br. 23-33; Pet. C.A. Reply Br. 21-30. Because the court of appeals rested its

decision solely on the ground that the Corps' jurisdictional determination was not "final agency action," it had no occasion to address petitioner's argument based on *Rueth* and *Leedom*. And because petitioner's current formulation of the argument was neither pressed nor passed on below, it is not properly before this Court. See, *e.g.*, *Auer* v. *Robbins*, 519 U.S. 452, 464 (1997) (declining to consider argument because it "was inadequately preserved in the prior proceedings").

b. In any event, neither the *Rueth* dicta nor the decision in *Leedom* supports petitioner's effort to obtain judicial review of the Corps' jurisdictional determination. The Seventh Circuit in *Rueth* rejected a challenge to pre-enforcement activities (EPA's issuance of a compliance order) under the CWA. 13 F.3d at 229-231. Petitioner relies on the *Rueth* court's statement that "it is not inconceivable that the EPA or the Corps of Engineers might completely overextend their authority. In such a case, we suggest to those agencies that we will not hesitate to intervene in pre-enforcement activity." *Id.* at 231. Nothing in *Rueth* suggests, however, that the Seventh Circuit would regard the Corps' jurisdictional determination in this case as the sort of *ultra vires* conduct that would justify pre-enforcement review.

In *Leedom*, this Court indicated that a statutory preclusion of review may be subject to a narrow exception when the plaintiff asserts legal rights for which there is no alternative means of vindication. 358 U.S. at 189-191. *Leedom* involved a National Labor Relations Board (Board) order that included professional and nonprofessional employees in the same collective bargaining unit—notwithstanding the fact that the professionals had not been permitted to vote—in clear contravention of Section 9(b)(1) of the National Labor Relations Act.

29 U.S.C. 159(b)(1) (providing that the Board "shall not" approve a mixed unit for collective bargaining purposes unless a majority of professional employees vote for inclusion). *Leedom*, 358 U.S. at 184-186. The question presented was whether the district court could review the Board's order given this Court's prior ruling that such orders were not subject to judicial review under the Act (except in circumstances inapplicable in *Leedom*). *Id.* at 187. The Court held that the district court had jurisdiction, explaining that a contrary decision "would mean a sacrifice or obliteration of a right which Congress has given professional employees for there is no other means within their control to protect and enforce that right." *Id.* at 190 (internal quotation marks and citation omitted); see *Board of Governors of the Fed. Reserve Sys.* v. *MCorp Fin., Inc.*, 502 U.S. 32, 42-44 (1991) (*Leedom* exception does not apply where plaintiff has meaningful and adequate alternative opportunity for judicial review of his claims).

The *Rueth* dicta and *Leedom*'s narrow exception are inapplicable here. First, the Corps expressed its view, at petitioner's request, as to the scope of the agency's CWA jurisdiction. The Corps has not asserted, let alone overextended, its authority in a binding manner. Second, the lack of judicial review at this stage does not entail "a sacrifice or obliteration" of any statutory right. As explained above (p. 9, *supra*), petitioner may proceed without obtaining a permit and, if the Corps brings an enforcement action, petitioner may then press its argument that the site at issue is not covered by the CWA. Petitioner will also have an opportunity for judicial review of the Corps' jurisdictional determination if it applies for a permit and the Corps denies the application or imposes conditions that petitioner finds unacceptable.

Third, unlike in *Leedom*, petitioner cannot show that the agency acted contrary to an unambiguous statutory provision. The Corps' regulations expressly authorize, but do not require, the Corps to issue jurisdictional determinations. 33 C.F.R. 320.1(a)(6); see C.A. Supp. E.R. 19. And the CWA neither requires nor prohibits such determinations. Although petitioner disagrees with the Corps' conclusion that the relevant property contains waters protected by the CWA, the agency's alleged error in applying the governing legal standards to a particular parcel would not involve the sort of manifest overreaching on which the *Leedom* exception is premised.

5. Even if the Corps' jurisdictional determination constituted "final agency action" under the APA, and assuming the CWA does not preclude judicial review,[5] that determination would not be ripe for judicial review. The ripeness doctrine is intended "to prevent courts * * * from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 148-149 (1967). Determining whether an agency action is ripe for judicial review generally requires a court to evaluate the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. *Id.* at 148-152. Agency action may be final without being ripe. See *National Park Hospitality Ass'n* v. *Department of the Interior*, 538 U.S. 803, 812 (2003).

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[5] See, *e.g.*, *Southern Pines Assocs. by Goldmeier* v. *United States*, 912 F.2d 713, 715-717 (4th Cir. 1990); *Hoffman Group, Inc.* v. *EPA*, 902 F.2d 567, 569 (7th Cir. 1990); see also Pet. App. B7-B8.

As the district court explained (Pet. App. B6-B7), the Corps' jurisdictional determination is not ripe for judicial review. The jurisdictional determination noted that petitioner may apply for a permit if it wishes to discharge fill material in developing its property. *Id.* at A4. Petitioner has not yet applied for such a permit, however, nor has it been subject to any enforcement action. Depending on the nature and circumstances of the proposed discharges, it is entirely possible that petitioner could receive a permit entitling it to develop its property without restrictions or that no enforcement action would be initiated. Those uncertainties, in addition to the possibility that changes to the property's condition might affect its status under the CWA (see note 3, *supra*), demonstrate that petitioner's suit is not ripe.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2009

No. 08-1052

In the
Supreme Court of the United States

FAIRBANKS NORTH STAR BOROUGH,

Petitioner,

v.

U.S. ARMY CORPS OF ENGINEERS; JOHN W. PEABODY; and KEVIN J. WILSON,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Petitioner Fairbanks North Star Borough seeks review of the Ninth Circuit Court of Appeals' decision holding that jurisdictional determinations under the Clean Water Act (CWA), 33 U.S.C. § 1251, *et seq.*, are not subject to judicial review. The arguments against a grant of certiorari advanced by Respondents United States Army Corps of Engineers, *et al.* (Corps), are without merit, for several reasons.

First, the decision below imposes an impossibly high standard for establishing the finality of agency action, by disregarding several significant legal and practical consequences that follow upon a jurisdictional determination. Second, the decision below conflicts with the settled ruled that CWA permits are judicially reviewable, as well as with decisions affirming judicial review of jurisdictional assertions under the Rivers and Harbors Act of 1899, 33 U.S.C. § 401, *et seq.* Moreover, the decision conflicts with this Court's decision in *Leedom v. Kyne*, 358 U.S. 184 (1958), and its progeny. Third, there are prudential reasons why the Borough's jurisdictional determination is ripe for review: it presents issues fit for judicial decision, and the withholding of review would impose a significant hardship on the Borough. The petition should be granted.

ARGUMENT

I

THE DECISION BELOW IMPOSES AN IMPOSSIBLY HIGH STANDARD FOR ESTABLISHING "FINAL AGENCY ACTION," DEPRIVING LANDOWNERS THROUGHOUT THE WEST OF THE RIGHT OF JUDICIAL REVIEW, AND THEREFORE RAISING AN IMPORTANT LEGAL QUESTION MERITING THIS COURT'S REVIEW

The Ninth Circuit's decision below, holding that CWA jurisdictional determinations are judicially unreviewable because they create no legal rights or obligations, radically misapplies this Court's finality jurisprudence to the point that review is merited. The Corps attempts to justify the Ninth Circuit's decision by dismissing the significant legal and practical consequences that flow from a jurisdictional determination. The Corps' arguments are without merit. More importantly, if the Corps' and the Ninth Circuit's understanding of administrative finality is allowed to stand, landowners' rights of judicial review will be seriously compromised.

A. A Jurisdictional Determination Creates the Possibility of an Estoppel Defense

Dismissing the creation of an estoppel defense as a ground for finality, the Corps contends that this Court has not definitively accepted the proposition that the government may be estopped. *See* Corps Br. at 8. But the Corps' argument ignores that this very question—whether estoppel lies against the

government—is itself an issue worthy of this Court's review and justifies the granting of certiorari. *See Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 423 (1990) ("We leave for another day whether an estoppel claim could ever succeed against the Government."). Moreover, the Corps ignores its own Regulatory Guidance Letter No. 08-02, discussed in the amicus brief of National Association of Home Builders (NAHB). *See* NAHB Br. at 13-15. The letter expressly states that a jurisdictional determination "can be used and relied on by the recipient of the approved [jurisdictional determination] . . . if a CWA citizen's lawsuit is brought in the Federal Courts against the landowner." *Id.* at 14. Hence, whether or not estoppel may lie against the government, even the Corps acknowledges that a jurisdictional determination can be used defensively by its recipient against a non-federal litigant. Surely, that relief ought to be enough to make the determination "final agency action," yet by the logic of the decision below and the Corps, such a determination cannot be judicially reviewed.

B. A Jurisdictional Determination Can Subject a Landowner to the CWA Permitting Regime, and Create Significant Coercive Effect

The Corps argues that forcing a landowner to apply for a permit cannot make an otherwise nonfinal agency decision judicially reviewable. Relatedly, the Corps contends that a jurisdictional determination does not subject its recipient to any duty, because all legal obligations flow ultimately from the statute

itself.[1] *See* Corps Br. at 9-10. But as the amicus brief of the State of Alaska explains, *see* Alaska Br. at 8-13, because the text of the CWA and its implementing regulations is so vague, a landowner cannot fairly be put on notice of his property's subjection to the CWA until the Corps makes a site-specific determination. *See id.* at 12 ("When the statute's applicability is unrecognizable to a landowner without a declaration from the Corps, the statute has legal force only through that declaration."). It is the jurisdictional determination itself by which "'obligations have been determined,'" and from which "'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (quoting *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)). *See also* NAHB Br. at 6 ("Thus, a landowner's legal rights and obligations are 'fairly traceable' to the Corps's issuance of an approved [jurisdictional determination].") (quoting *Bennett*, 520 U.S. at 170-71).

The Corps also completely ignores the tremendous coercive effect that a jurisdictional determination can have. As NAHB notes, *see* NAHB Br. at 8, the reasoning of the lower court and of the Corps represents a departure from *Bennett*, in which this Court acknowledged that some government action,

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[1] The Corps' reliance on *FTC v. Standard Oil Co.*, 449 U.S. 232 (1980), is misplaced. Although the Court there held that the burden of submitting to an agency administrative proceeding could not convert the administrative complaint into a final agency action, *see id.* at 239-43, the case is distinguishable because the relevant administrative proceeding here—the jurisdictional determination process—has concluded. Nothing in *Standard Oil* suggests that the company could not seek review of the administrative adjudication *following* its completion, *cf. id.* at 244-45, which is what the Borough seeks here.

although not necessarily legally binding, can through coerciveness function as the equivalent of binding action. *See Bennett*, 520 U.S. at 169 (noting that a biological opinion issued under the Endangered Species Act, 16 U.S.C. § 1531, *et seq.*, "theoretically serves an 'advisory function' [but] in reality has a powerful coercive effect" (citation omitted)).

As Alaska observes, *see* Alaska Br. at 20-23, a jurisdictional determination can be exceptionally burdensome by requiring expensive and time-consuming mitigation efforts if a permit is pursued. NAHB further details a number of negative effects attendant upon a jurisdictional determination: loss in property value, additional disclosures to potential buyers, reduction in a project's "green" rating, loss of federal funding, and ineligibility under the National Flood Insurance Program. *See* NAHB Br. at 16-26.

Relying upon the lower court's comparison to the private wetlands consultant, the Corps belittles the persuasive effect of a jurisdictional determination and concludes that a landowner's good faith defense to a CWA civil penalty, *cf.* 33 U.S.C. § 1319(d), cannot be undercut simply by the existence of a jurisdictional determination. But the Corps gives no consideration to the deference that the agency's resolution of the complicated and sophisticated scientific issues presented in a jurisdictional determination would receive from a court. *See* Alaska Br. at 13-16.

All of these effects combine to create a strong coercive force on the landowner either to abandon the project or to expend considerable time and money to seek a permit, based upon the outcome of a jurisdictional determination. The Corps' blinkered review of these effects confirms that the Ninth Circuit's

finality analysis departs from *Bennett* and raises an issue of signal importance for this Court's review.

II

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS, AND THEREFORE MERITS THIS COURT'S REVIEW

A. The Decision Conflicts with Those Cases Holding That Permitting Decisions Are Judicially Reviewable

The Corps argues that there is no conflict between the decision below and the established proposition that permit decisions are judicially reviewable, *see* Corps Br. at 11-12, but the Corps offers no convincing response to the Borough's permit analogy. The Corps attempts to distinguish a jurisdictional determination as an "advisory opinion." *Id.* at 12. But that litigation description cannot be reconciled with the Corps' regulatory descriptions. For example, in the Regulatory Guidance Letter discussed above and cited in NAHB's brief, the Corps asserts that a jurisdictional determination can be relied upon by the landowner for five years, and can be used by him defensively against a private-party litigant. *See* NAHB Br. at 14. Such are hardly the effects of an advisory document.

Moreover, as the Borough noted in its petition, if a jurisdictional determination denying jurisdiction can be used defensively (as the Corps admits), then the alleged *wrongful* issuance of a jurisdictional determination finding jurisdiction should be judicially reviewable. *See* Pet. at 16-18. The Corps acknowledges that a permit denial is reviewable

because "it foreclose[s] that avenue by which an individual can discharge pollutants." Corps Br. at 12. Yet the same is true analogously with a jurisdictional determination, which can provide a landowner with an estoppel defense against either a governmental or private litigant.

B. The Decision Conflicts with Those Cases Holding That Determinations Under the Rivers and Harbors Act Are Judicially Reviewable

In its amicus brief, NAHB demonstrates that the decision below conflicts with those cases engaging in judicial review of the Corps' determination that a given waterbody is a traditional navigable water—the predicate for Corps jurisdiction under the Rivers and Harbors Act. *See* NAHB at 9-13. Just as the existence of a permitting regime under the Rivers and Harbors Act did not preclude those courts from immediately addressing the Corps' jurisdictional finding, so too the existence of the CWA permitting regime should not preclude judicial review of a CWA jurisdictional determination.

The Corps argues that these Rivers and Harbors Act cases are inapposite because they do not concern the CWA, and because the issue of final agency action was not raised. *See* Corps Br. at 7 n.2. Neither argument has merit. First, the Corps raises a distinction without a difference. Both the CWA and the Rivers and Harbors Act have permitting regimes, and both predicate Corps jurisdiction on the existence of certain types of waters. Thus, the reasons for and against immediate judicial review of the predicates for Rivers and Harbors Act jurisdiction are identical to those for and against review of jurisdictional

determinations. Second, the Rivers and Harbors Act cases expressly observed that the agency determinations there at issue were reviewable under the Administrative Procedure Act. *See, e.g., Lykes Bros., Inc. v. U.S. Army Corps of Eng'rs*, 64 F.3d 630, 633 (11th Cir. 1995); *Loving v. Alexander*, 548 F. Supp. 1079, 1081-82 (W.D. Va. 1982), *aff'd*, 745 F.2d 861 (4th Cir. 1984).

C. The Decision Conflicts with *Leedom* and Its Progeny

In *Leedom*, this Court held that an otherwise nonfinal agency action can be judicially reviewed if to decline judicial review would result in the evisceration of the rights of the one seeking review. 358 U.S. at 189-90. The Seventh Circuit in *Rueth v. United States Environmental Protection Agency*, 13 F.3d 227 (7th Cir. 1993), applying the *Leedom* doctrine to the CWA context, concluded that judicial review of an otherwise unreviewable CWA enforcement order could be had in the face of a complete overextension of agency authority. The Ninth Circuit's decision below rejecting review of jurisdictional determinations conflicts with *Leedom* and *Rueth*.[2]

The Corps' attempts to distinguish *Leedom* and *Rueth* fail. The Corps contends that it has not

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[2] The Corps contends without merit that this conflict was not raised below. *See* Corps Br. at 12-13. Although *Leedom* and *Rueth* were discussed in a portion of the Borough's appellate brief addressing whether the CWA affirmatively precludes judicial review of jurisdictional determinations, the actual argument advanced therein—judicial review is compelled to preserve the Borough's rights in the face of the Corps' complete overextension of authority—is identical to that advanced here as a basis for this Court's review.

overextended its authority. But this self-serving observation runs directly contrary to Alaska's view that the substance of the jurisdictional determination here challenged—that permafrost can be regulated under the CWA—threatens to subject much of the state's property to federal control. *See* Alaska Br. at 1-3. The Corps argues that the challenged jurisdictional determination does not assert anything in a binding manner. *See* Corps Br. at 14. Yet that characterization conflicts with the Corps' own description of the jurisdictional determination as "final agency action," *see* 33 C.F.R. § 320.1(a)(6), and its description of the determination's effects in its Regulatory Guidance Letter, *see* NAHB Br. at 14. The Corps blithely contends that the jurisdictional determination does not require the Borough to forfeit any right, *see* Corps Br. at 14, but in so contending, the Corps ignores the determination's coercive force as well as the fundamental constitutional right to own and to use property. *Cf. The Civil Rights Cases*, 109 U.S. 3, 22 (1883) (observing that among "those fundamental rights which are the essence of civil freedom [is] . . . the . . . right to inherit, purchase, lease, sell, and convey property"). Finally, the Corps seeks to create a distinction between the procedure of issuing a jurisdictional determination (a procedure which is not here challenged), and the substance of that determination. *See* Corps Br. at 15. But to allow the Corps to hide its substantive errors behind its procedural blamelessness would drain *Leedom* and *Rueth* of all significance.

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The decision below conflicts with the rule that permitting decisions are reviewable, with the River and Harbors Act cases, and with *Leedom* and its progeny. This Court should grant the petition.

III

PRUDENTIAL CONCERNS WARRANT REVIEW OF THE BOROUGH'S JURISDICTIONAL DETERMINATION

The Corps argues that the Borough's jurisdictional determination is not ripe for review, because the Borough can always seek a permit. *See* Corps Br. at 15-16. The argument is without merit.

The Borough's jurisdictional determination is ripe because the issues presented therein are fit for judicial decision, and hardship would befall the Borough if judicial review were withheld. *See Nat'l Park Hospitality Ass'n v. Dep't of Interior* 538 U.S. 803, 808 (2003). The Corps determined that the Borough's property qualifies as wetlands under its Wetlands Manual, and also constitutes waters of the United States under the CWA. Further, the Corps completed its regulatory obligation to rule upon the Borough's request for a jurisdictional determination, the Borough has exhausted all administrative appeals, and thus no additional factual development of the record is possible.

It is true that physical circumstances may change, and so too the Corps' jurisdictional determination. Also, the Borough can still apply for a permit. But if those points were sufficient to deny review of the jurisdictional determination, they also would be sufficient, as noted above, to deny judicial review to permit decisions. If the ability to apply for another permit were sufficient to defeat judicial review, then permit denials would never be reviewable, because an applicant is not precluded from seeking another permit following a permit denial. And as documented by the Borough's amici, *see* Alaska Br. at 19-24; NAHB Br. at 16-26, the significant cost and delay associated with applying for and obtaining a CWA permit[3] more than adequately establish hardship sufficient to justify judicial review.

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[3] *Rapanos v. United States*, 547 U.S. 715, 719 (2006) (plurality opinion) ("The average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915-not counting costs of mitigation or design changes." (citing David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Nat. Resources J. 59, 74-76 (2002)).

CONCLUSION

For the foregoing reasons, the petition should be granted.

DATED: May, 2009.

Respectfully submitted,

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No. 08-1052

In The
Supreme Court of the United States

FAIRBANKS NORTH STAR BOROUGH,
Petitioner,

v.

U.S. ARMY CORPS OF ENGINEERS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONER

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INTERESTS OF AMICUS CURIAE

The National Association of Home Builders (NAHB) has received the parties' written consent to file this *amicus curiae* brief in support of Petitioner.[1]

NAHB is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent and affordable housing. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's more than 200,000 members are home builders and/or remodelers, and its builder members construct about 80 percent of the new homes each year in the United States.

NAHB is a vigilant advocate in the Nation's courts. It frequently participates as a party litigant and *amicus curiae* to safeguard the property rights and interests of its members. NAHB was a petitioner in another Clean Water Act (CWA) case, *NAHB v. Defenders of Wildlife*, 127 S.Ct. 2518

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief. Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission.

(2007). It has also participated before this Court as *amicus curiae* or "of counsel" in a number of cases involving landowners aggrieved by excessive regulation under a wide array of statutes and regulatory programs. See Appendix A.

NAHB's organizational policies have long advocated that the federal courts must be available for landowners to adjudicate their rights and duties arising under federal law. The court of appeals' decision undermines this chief objective of *amicus*. As a result of the fragmented opinion in *Rapanos v. United States*, property owners must determine the extent of CWA jurisdiction by "feel[ing] their way on a case-by-case basis." 547 U.S. 715, 758 (2006) (Roberts, C.J., concurring). Land owners presently lack any clear understanding of whether an otherwise ordinary aquatic feature on their property, such as a creek, pond, or wetland, will be deemed within the control of the U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) as they administer the CWA's massive bureaucracy.

Such sprawling regulatory encroachment is compounded by the court of appeals' decision, which shields the agencies' "jurisdictional determinations" (JDs) from impartial judicial review. As a result, property owners have no choice but to abide by overly-zealous and unreasonable assertions of CWA jurisdiction – or else they will become targets of a Corps or EPA enforcement action. The agencies can thus roam at will because

they have no real apprehension that a federal judge might question the breadth of a particular JD.

The Court should grant certiorari to confirm that the federal court forum is available to land owners. It can thereby restore some balance to the lop-sided and unjust system by which the Executive Branch subjects private property to CWA jurisdiction.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICTS WITH THIS COURT'S DECISIONS AND THOSE FROM OTHER CIRCUITS.

A. Conflict With This Court's Decisions, Including *Bennett v. Spear*.

The court of appeals withheld judicial review of a Corps JD regarding wetlands on Fairbanks's property, reasoning that such a determination is not "final agency action" under the Administrative Procedure Act (APA). *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 597 (9th Cir. 2008). Certiorari is warranted because the opinion below decides an important federal question in a manner that conflicts with this Court's decisions, in particular *Bennett v. Spear*, 520 U.S. 154 (1997). S.Ct. Rule 10(c).

Bennett set forth the two-part test to decide when agency action is final for purposes of APA

review. First, the action "must mark the consummation of the agency's decision making process." *Bennett*, 520 U.S. at 177-178. The court of appeals acknowledged that the Fairbanks JD met the first prong of the *Bennett* test, because it "announces the Corps' considered, definite and firm position about the presence of jurisdictional wetlands." *Fairbanks*, 543 F.3d at 593.

Error lies in the court of appeals' consideration of *Bennett*'s second element: agency action is final if it is "one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at 178 (internal quotes omitted). The opinion below provides that the JD at issue was not final because legal obligations arose "solely from the CWA, and not from the Corps' issuance of an approved jurisdictional determination." *Fairbanks*, 543 F.3d at 594. Certiorari should be granted because the Ninth Circuit's analysis strips the "rights or obligation" prong of all meaning.

The CWA prohibits "discharges" into statutory "navigable waters" unless authorized under the permit provisions of section 402 ("any pollutant") or section 404 ("dredged or fill material"). 33 U.S.C. §§ 1311, 1342(a), 1344(a). In *Bennett*'s parlance, a landowner has an "obligation" to obtain a section 404 permit if he wants to discharge dredged or fill material into jurisdictional wetlands on his property, and faces the "consequences" of violating federal law and CWA enforcement if those resources are filled without the requisite permit.

Simply put, if private property contains covered wetlands, the landowner must get agency approval to fill them. The presence of CWA waters on private land shapes behavior, alters legal relationships, and creates responsibilities that do not exist on property *without* statutory "navigable waters."

The court of appeals stated that "[a]t bottom, Fairbanks has an obligation to comply with the CWA," and then arrived at the *non sequitur* that legal obligations "arise directly and solely" from the statute and not the Corps's JD. *Fairbanks*, 543 F.3d at 594. That is illogical and circular. Of course Fairbanks has the CWA obligation to avoid filling jurisdictional wetlands. The very reason that the Corps issued the JD was to implement the CWA and impose upon Fairbanks the duty to avoid filling jurisdictional waters without first procuring section 404 approval. The CWA's permit sections are not self-executing; the federal government cannot indiscriminately claim section 404 authority over private land unless it determines that statutory "navigable waters" exist there. Especially in light of the confusion since *Rapanos*,[2]

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[2] At least eight petitions have been submitted to this Court to resolve the confusion surrounding CWA jurisdiction in the wake of *Rapanos*. See *Gerke Excavating, Inc. v. United States*, 464 F.3d 723 (7th Cir. 2006), *cert. denied*, 128 S. Ct. 45 (2007); *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006), *cert denied*, 128 S. Ct. 375 (2007); *No. Cal. River Watch v. City of Healdsburg*, 496 F.3d 999 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 1225 (2008); *United States v. Heinrich*, 184 Fed. Appx. 542 (7th Cir. 2006), *cert. denied*, 127 S. Ct. 2974 (2007); *United States v. Morrison*, 178 Fed. Appx. 481 (6th Cir. 2006),

as a practical matter most landowners do not ordinarily know if their property contains aquatic resources within federal CWA jurisdiction. They are accordingly unaware whether they need a discharge permit until and if the Corps determines that "navigable waters" are present. Thus, a landowner's legal rights and obligations are "fairly traceable" to the Corps's issuance of an approved JD. See *Bennett*, 520 U.S. at 170-71. Consequences can be avoided or redressed if a court strikes an agency's unreasonable assertion of CWA jurisdiction through APA review.

If the court of appeals' analysis stands, then the agency action in *Bennett* would never have been exposed to judicial review. *Bennett* involved a challenge against a Fish and Wildlife Service (FWS) biological opinion issued under the Endangered Species Act (ESA). The biological opinion concluded that operation of a proposed irrigation project would likely "jeopardize the continued existence" of two fish species unless "reasonable and prudent alternatives" were imposed to maintain minimum water levels in a lake and reservoir. 520 U.S. at 159. Federal obligations to avoid jeopardy through consultation, and develop a biological opinion offering reasonable and prudent alternatives, derive from the text of

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cert. denied, 127 S. Ct. 270 (2007); *Baccarat Fremont Developers, LLC v. U.S. Army Corps of Eng'rs*, 425 F.3d 1150 (9th Cir. 2005), *cert. denied*, 127 S. Ct. 1258 (2007); *United States v. Moses*, 496 F.3d 984 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 2963 (2008); *Lucas v. United States*, 516 F.3d 316 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 116 (2008).

ESA section 7. See 16 U.S.C. §§ 1536(a)(2), (b)(3)(A).

Under the court of appeals' reasoning, the biological opinion in *Bennett* would not be "final agency action" because the obligations to avoid species' jeopardy and develop reasonable and prudent alternatives stem from the ESA's very language. Yet, this Court found that the biological opinion *itself* imposed rights and obligations, and thus FWS's very action was amenable to APA review. *Bennett,* 520 U.S. at 178. This Court did not adopt the court of appeals' fiction that FWS's action was off-limits to court review because the obligation to avoid species' jeopardy flowed from the underlying ESA statute.[3] Likewise, whether the Corps was too zealous here in determining the breadth of "navigable waters" on Fairbanks's property should not be shielded from judicial scrutiny, just because the CWA establishes the basic prohibition against discharges into covered wetlands without a permit.

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[3] Similarly, under the National Environmental Policy Act (NEPA), agencies must develop an environmental impact statement (EIS) for any "major action significantly affecting the human environment." 42 U.S.C. § 4332(C). Under the Ninth Circuit's reasoning, an EIS would not be a final agency action, because the requirement to develop it and its substance emanates from NEPA. *Id.* Yet, it is well settled that a final EIS is a final agency action for purposes of APA review. See *Or. Nat. Desert Ass'n. v. Bureau of Land Mgmt.*, 531 F.3d 1114, 1139 (9th Cir. 2008) (listing the courts of appeals that have found an EIS is a final agency action).

Nor did *Bennett* resort to the confusing and undecipherable distinction drawn by the court of appeals, between a "legal consequence" of an agency action that supports a conclusion of APA finality and a "practical effect" of that same action which does not. *Fairbanks,* 543 F.3d at 595-96. Rather, *Bennett* recognized that a biological opinion, which "theoretically serves an 'advisory function' ... in reality has a powerful coercive effect." *Bennett,* 520 U.S. at 169. So too with JDs. The Corps and EPA generally do not "choose[ ] to deviate" from their determinations of CWA jurisdiction and suddenly allow parties to fill covered wetlands without a permit. See *id.;* Cf. *Nat. Res. Def. Council v. Costle,* 568 F.2d 1369 (D.C. Cir. 1977) (EPA does not have the authority to exempt classes of dischargers from CWA permitting requirements).

Moreover, in NAHB's experience, when its members are constrained by Corps JDs, they do not blithely ignore them lest they be faced with serious enforcement and penalty issues. "[W]e are to apply the finality requirement in a 'flexible' and 'pragmatic' way." *Abbott Labs. v. Gardner,* 387 U.S. 136, 149-50 (1967), *overruled on other grounds by Califano v. Sanders,* 430 U.S. 99 (1977); see also *Ciba-Geigy Corp. v. EPA,* 801 F.2d 430, 435-36 (D.C. Cir. 1986). To that end, this Court and other lower courts advise that whether an action is final for APA review should be assessed from the vantage point of a regulated entity that is the object of the agency's decision. An agency action is final if it is " 'definitive' " and has a " 'direct and

immediate ... effect on the day-to-day business' " of the party challenging it. *FTC v. Standard Oil Co.*, 449 U.S. 232, 239, (1980) (quoting & citing *Abbott Labs.*, 387 U.S. at 152). Certainly from the perspective of Fairbanks and private land owners, a JD from the Corps is not an "otherwise idle ... statement of agency policy" but rather "carr[ies] easily-identifiable legal consequences for the ... would-be dischargers." *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1279 (D.C. Cir. 2006).

To conclude, if the court of appeals' reasoning stands, then agencies could always evade APA review simply by claiming their actions have no legal effect, but merely stem from authorizations and responsibilities imposed by Congress. Theoretically, all agency decisions should have *some* grounding in a piece of authorizing legislation. Certiorari should be granted to review the court of appeals decision, bring it in line with this Court's precedent, and allow land owners the chance to seek court review of Corps JDs that assert federal control over their real property.

B. Conflict With Other Circuits.

The court of appeals' holding contradicts other circuits that have exercised judicial review to decide the merits of whether specific resources are deemed "navigable waters of the United States" under the Rivers and Harbors Appropriation Act of 1899 (RHA), 33 U.S.C. § 401 et seq.

Similar to the CWA, the RHA "requires that a permit be obtained from ... the Army Corps of Engineers, for any activity which takes place in navigable waters of the United States, or which affects the capacity of such waters." *Swanson v. United States*, 789 F.2d 1368, 1371 (9th Cir. 1986).[4] For RHA purposes, "navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." 33 C.F.R. § 329.4 (2008) (Corps regulation). These features are referred to as "traditional navigable waters," defined by seminal opinions such as *The Daniel Ball*, 77 U.S. 557 (10 Wall. 557) (1871), and *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-08 (1940). Traditional navigable waters are "what Congress had in mind as its authority for enacting the CWA." *Solid Waste Agency of N. Cook. County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001).[5] Contrary to the court of appeals' opinion, after the Corps makes a "navigable water of the United States" determination, other circuits have invoked APA review to adjudicate RHA jurisdictional decisions.

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[4] The Rivers and Harbors Act requires a permit "for structures and/or work in or affecting navigable waters of the United States." 33 C.F.R. § 322.3 (2008).

[5] However, this Court appears unanimous in holding that the CWA covers more than just traditional navigable waters. See *Rapanos v. United States*, 547 U.S. 715, 731 (2006) (plurality).

For example, in *Lykes Bros., Inc. v. U.S. Army Corps of Eng'rs*, 64 F.3d 630 (11th Cir. 1995), property owners along Fisheating Creek erected fences, felled trees, and posted "no trespassing" signs to keep the public from using the Creek. Subsequently, the Corps prepared a report, finding that Fisheating Creek was a "navigable water of the United States." Lykes Brothers "brought a civil action pursuant to *5 U.S.C. § 704* against the [Corps] seeking to review and set aside the [agency's] determination that Fisheating Creek ... is a navigable water of the United States ...." *Id.* at 633 (emphasis added). Significantly, the Lykes Brothers invoked the APA to obtain judicial review over the Corps's action. After a 17-day trial and "expending a great amount of time to fully digest the voluminous testimony, enough exhibits to fill every wall of the courtroom, and the learned memoranda of the parties," the trial court concluded that Fisheating Creek was *not* a "navigable water of the United States." *Lykes Bros., Inc v. U.S. Army Corps of Engineers,* 821 F. Supp 1457, 1458 (M.D. Fla. 1993). On appeal, the Eleventh Circuit reviewed the factual findings and found no error in the trial court's decision. Thus, the *merits* of the Corps's decision was tried and appealed – all without raising the question of whether the Corps's decision regarding the Creek's jurisdictional status was final agency action. See also *United States v. C.E. Harrell*, 926 F.2d 1036 (11th Cir. 1991) (reaching the merits and overturning Corps's determination that Lewis Creek was a navigable water of the United States, even though no permits had been sought to use the

waterbody and without any question of whether the agency's action was final).

Similarly, in *Loving v. Alexander*, 548 F. Supp 1079 (D.C. Va. 1982), *aff'd*, 745 F.2d 861, 863 (4th Cir. 1984) approximately 67 riparian land owners sought a "judgment declaring that the Jackson River is nonnavigable from the mouth of Dunlap Creek . . . to the base of the Gathright Dam ...." 548 F.Supp. 1079. The district court upheld the Corps's assertion of RHA jurisdiction, found its "determination of navigability is an agency action," and decided that the "plaintiffs . . . stated a cause of action under the [APA]." On appeal, the Fourth Circuit recognized that "navigability is a term that has traditionally been defined by decisions of federal courts" and affirmed the district court's decision. *Loving*, 745 F.2d at 864. See also *Leslie Salt Co. v Froehlke*, 578 F.2d 742, 747 (9th Cir. 1978) (reaching the question of Corps jurisdiction even though the suit "did not involve action or inaction by the Corps on any particular application by [the plaintiff] for a permit under the Rivers and Harbors Act or the [CWA]," because the plaintiff refused to apply for a permit).

Thus, the circuit courts have routinely treated jurisdictional determinations completed under the RHA as final agency action subject to APA judicial review. In light of this Court's recognition in *SWANNC* and *Rapanos* that traditional navigable waters provide the basis for the CWA's scope, and the fact that both the CWA and RHA have similar permitting processes, *Fairbanks* cannot be

reconciled with other circuit court decisions that address the merits of Corps assertions of authority over the "navigable waters of the United States." If there is a reason why the Corps's RHA jurisdictional determinations are final agency action subject to judicial review but the Corps's CWA determinations are not, then this Court should grant certiorari to clarify any basis for such a distinction.

II. THE CORPS ITSELF TREATS CWA JURISDICTIONAL DETERMINATIONS AS HAVING BINDING, LEGAL EFFECT.

The Corps's litigating position, that JDs issued under the CWA are not final agency action, is belied by its own regulations and policies.

To wit, the agency's regulations state that JDs are "Corps final agency action." 33 C.F.R. § 320.1(a)(6).

And, recent guidance provides further confirmation of the agency's regulatory position (if not the one it has argued to the court of appeals). On June 26, 2008, the Corps issued Regulatory Guidance Letter No. 08-02, on the subject of JDs[6] (hereinafter RGL 08-02). In RGL 08-02, the agency addresses the differences between "preliminary" jurisdictional determinations and "approved" jurisdictional determinations. The Corps describes preliminary determinations as non-binding, but

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[6] *Available at* http://newsletters.wetlandstudies.com/docUpload/RGL08021.pdf (last visited March 18, 2009).

describes an *approved* determination as "an official Corps determination that jurisdictional 'waters of the United States,' or 'navigable waters of the United States,' or both, are either present or absent on a particular site." RGL 08-02 at 1. The agency's own description of an approved determination is thus a far cry from a "bare statement of [its] opinion." *Fairbanks*, 543 F.3d at 593.

Furthermore, RGL 08-02 highlights the rights, obligations, and legal consequences that stem from an approved jurisdictional determination:

> An approved JD:
>
> (1) constitutes the Corps' official, written representation that the JD's findings are correct;
> (2) *can be relied upon by a landowner, permit applicant, or other "affected party" (as defined at 33 C.F.R. 331.2) who receives an approved JD for five years* (subject to certain limited exceptions explained in RGL 05-02);
> (3) *can be used and relied on by the recipient of the approved JD* (absent extraordinary circumstances, such as an approved JD based on incorrect data provided by a landowner or consultant) if a CWA citizen's lawsuit is brought in the Federal Courts against the landowner or other "affected party," challenging the legitimacy of that JD or its determinations; and

> (4) can be immediately appealed through the Corps' administrative appeal process set out at 33 CFR Part 331.

RGL 08-02 at 2 (emphasis supplied). One would certainly think that an approved JD carries with it legal rights if it can be relied upon for five years as against the Corps and EPA, and can further be used to defend against a CWA citizen suit.

It is hard to understand how the Corps can develop this policy less than a year ago, and now argue that approved JDs do not affect rights or obligations or produce legal consequences. The Court should grant certiorari to integrate the law on final agency action with the Corps's policy on "approved" JDs.

III. A CWA JURISDICTIONAL DETERMINATION HAS MANY CONSEQUENCES BEYOND THE CORPS PERMIT PROCESS.

The court of appeals' conclusion that a wetlands JD does not impose obligations, deny rights, or fix legal relationships except in the context of a "permit application or enforcement proceeding" (*Fairbanks*, 543 F.3d at 595), is simply wrong. That view is grounded in neither practical business reality nor an adequate understanding of modern environmental and "green building" programs. There are many instances in which a property owner would seek a determination as to whether wetlands are subject to federal CWA jurisdiction,

aside from the section 404 permitting process or agency-initiated enforcement. Indeed, a landowner should simply have a right to know if her property contains resources subject to federal agency regulation, even if she does not want to incur the time and expense of obtaining a 404 permit. [7]

In any event, various economic and legal consequences flow from jurisdictional determinations and impact the value and usability of land.

A. The Value of Real Property is Impacted by a Jurisdictional Determination.

The value of real property is influenced by the "highest and best use"[8] options available to the owner. The presence of federally-regulated wetlands will often decrease the options available to an owner and prospective purchaser of real property. The resulting uncertainty may cause a significant reduction in value. Due to these high

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[7] "The average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a Nationwide permit spends 313 days and $28,915 – not counting costs of mitigation or design changes." *Rapanos*, 547 U.S. at 719 (plurality opinion)

[8] A leading group representing the interests of the real estate appraisal industry defines "highest and best use" as: "The reasonably probable and legal use of vacant land or an improved property that is physically possible, appropriately supported, financially feasible and that results in the highest value." Appraisal Institute, The Appraisal of Real Estate, 13th ed. 277-278 (Chicago: Appraisal Institute ed., 2008)

risks, the identification of federally-regulated wetlands has become a routine part of many real estate transactions.

Consider for example the investor who holds an option contract to purchase certain unimproved land. As part of the due diligence process the investor needs to determine whether such land contains a CWA "navigable water." In turn, the existing owner must request a JD from the Corps. The Corps, in turn, issues a positive determination indicating the presence of jurisdictional wetlands. Assuming the wetlands consume the property line which is coincident with the edge of the public roadway, access to the property may be severely restricted. If the wetlands pock-mark the property, the buildable envelope may be reduced or eliminated entirely. The investor must also consider whether authorization to alter the wetlands can be secured, the time and expense of securing such authorizations (including mitigation costs), and any past CWA violations or possible future enforcement actions. See Randall S. Guttery, Stephen L. Poe & C.F. Sirmans, *An Empirical Investigation of Federal Wetlands Regulation and Flood Delineation: Implications for Residential Property Owners*, 26 J. Real Estate Research, No. 3, at 303 (2004); Margaret N. Strand, *Wetlands: Avoiding the Swamp Monster*, *in* Environmental Aspects of Real Estate Transactions, From Brownfields to Green Buildings 720, 721 (James B. Witkin 2nd ed., 1999). Each of these considerations flow from a determination that CWA-covered resources exist on the real estate

in question and will profoundly impact its market value.

Similarly, a lender will always want to assess the value of real property before advancing any funds. As an executive for the Maryland Bankers Association remarked on loans secured by unimproved land, "Unless we have a reason to know that it is or isn't a wetland, we just don't know the value of it."[9] A JD will be considered alongside any private restrictions, zoning, building codes, historic district controls and other environmental regulations to reach a reasonable market value opinion. In addition, a JD will trigger a marked increase in the amount of site feasibility documentation required by the lender for loan approval. This will directly affect the borrower's investment and development choices by increasing the length of time required to secure loan approval, the types of outside consultants needed to produce necessary documentation, and the costs associated with both. D. Linda Kone, *Land Development*, 50-51 (National Association of Home Builders, 18th ed. 1994).

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[9] William Bunkley, Charles P. Edmunds, *Appraising Wetlands*, Appraisal Journal (1992) (quoting John Bowers, Jr. Executive Vice President, Maryland Bankers Association), *available at* http://www.entrepreneur.com/tradejournals/article/12085965_1.html (last visited on Mar. 20, 2009)

B. Some States Require Real Property Owners to Disclose The Presence of Wetlands to Buyers.

JDs also have significant legal consequences for owners of real property in terms of disclosures to prospective purchasers. Recognizing the potentially devastating impact a JD may have on property value, a number of states now impose strict wetland disclosure obligations on sellers of residential real property.

In Louisiana, under Act 308 of the 2003 Louisiana Legislature, the seller must disclose whether "any part of the property [has] been determined a wetland by the United States Army Corps of Engineers under § 404 of the Clean Water Act," attach a copy of the JD, and provide notice that additional costs for a section 404 permit may result. La. Rev. Stat. Ann. §9:3195-3199 (2008). The requirement to disclose the presence of CWA-covered wetlands is made a basic part of a real estate sales transaction through the Louisiana Residential Property Disclosure form.[10]

In Hawaii, the seller is required to provide the purchaser with a disclosure statement that fully and accurately exposes all known or reasonably discoverable "material facts" relating to the property. Haw. Rev. Stat. Ann. § 508D-1 (2008). "Material facts" are defined as "any fact, defect, or

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[10] *Available at* http://www.lrec.state.la.us/Residential%20Property%20Disclosure% 2003-01-08.pdf (last visited Mar. 17, 2009).

condition, past or present, that would be expected to measurably affect the value to a reasonable person of the residential real property being offered for sale." *Id.* Because a Corps wetland determination measurably impacts the value of property, such determination would need to be disclosed to all prospective purchasers. In Florida, wetlands constitute a material fact affecting property value and appear as a disclosure item on the Florida Association of Realtors Property Disclosure Statement. Fla. Stat. Ann. § 475.278 (2006).[11] See also, R.I Gen. Laws § 5-20.8-2(b)(2)(xxix) (2008) (requiring disclosure of all "material facts" regarding the property, including the location of coastal wetlands, fresh water wetlands, marshes or swamps that may impact future development). The seller of residential real property in Oregon faces a similar duty to disclose "any governmental studies, designations, zoning overlays, surveys or notices that would affect the property." Or. Rev. Stat. § 105.464 (2009).

Likewise, the Maryland Code requires the seller to disclose general "land use matters." Md. Code Ann., [Real Prop.] § 10-702 (2007). Interpretation of what this covers is left up to the State Real Estate Commission. *Id.* The standardized seller disclosure and disclaimer form developed by the State Real Estate Commission explicitly covers

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[11] http://www.sellinghomemadeeasy.com/forms/Florida.pdf (last visited Mar. 20, 2009).

wetlands.[12] Leaving no room for interpretation, the Wisconsin Code includes a report form entitled Real Estate Condition Report Disclaimer. Wis. Stat. § 709.03 (2008). Part C.11 of the report requires disclosure of all "floodplain, wetland or shoreland zoning area[s]." *Id.*

While these wetland disclosure obligations will place the prospective purchaser in a more informed position regarding pitfalls associated with the property, they also have the effect of commanding the property owner to affirmatively disclose the presence of regulated wetlands. Failure to do so may trigger legal consequences sounding in breach of contract, fraudulent concealment, and negligent misrepresentation.

C. A Project's "Green" Rating can be Affected by a Wetlands Jurisdictional Determination.

"As the environmental impact of buildings becomes more apparent, a new field called 'green building' is gaining momentum."[13] "Green building is the practice of creating structures and using processes that are environmentally responsible and resource-efficient throughout a building's life-cycle

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[12] Maryland Residential Property Disclosure and Disclaimer Statement, *available at* http://www.dllr.state.md.us/forms/danddform.doc (last visited Mar. 20, 2009).

[13] EPA Green Building Home Page, http://www.epa.gov/greenbuilding (last visited Mar. 16, 2009).

from siting to design, construction, operation, maintenance, renovation and deconstruction."[14] As illustrated by EPA's definition, green building, involves not only how buildings are constructed, but also *where* they are constructed. Whether wetlands are impacted is important in this calculation.

For example, the American National Standards Institute (ANSI) recently approved the International Code Council's National Green Building Standard, which establishes "practices for the design and construction of green residential buildings, building sites, subdivisions and renovation thereof." International Code Council, *National Green Building Standard*, 700-2008, § 101.3 (2009) (NGB Standard). Under the NGB Standard, projects are awarded points for using green building practices. One such practice is avoiding environmentally sensitive areas, including wetlands. *Id.* §§ 202, 403.11. Significantly, the NGB Standard's definition of "wetland" is identical to that of the Corps at 33 C.F.R. § 328.3(b). Therefore, the presence of CWA-covered wetlands on site is relevant to a project's green rating, regardless of whether a section 404 permit is procured.

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[14] EPA Green Building, Basic Information, http://www.epa.gov/greenbuilding/pubs/about.htm (last visited Mar. 16, 2009).

Similarly, Green Communities, which provides funds and expertise to enable developers to build affordable homes that are better for the environment, has created criteria that must be met before a developer is eligible for a Green Communities grant. *Green Communities Criteria 2008*, 4 (2008), http://www.practitionerresources.org/cache/documents/666/66641.pdf. One of the Green Communities mandatory criteria requires that a development not be located within 100 feet of a wetland. *Id.* at 6, 16 (2008). Again, Green Communities uses the federal government's regulatory definition of wetlands. Under this program, a jurisdictional determination would negatively impact a developer's green rating if he planned to place a building within 100 feet of a wetland, even though he would not need a section 404 permit.

D. Certain EPA Construction Grants do not Allow Filling of Wetlands.

When the Corps concludes that an area is a jurisdictional wetland it has a direct effect on whether a project can connect to certain sewage treatment plants. The CWA allows EPA "to assist the development and implementation of waste treatment management plans and practices ...." 33 U.S.C. § 1281(a). Specifically, the Act authorizes the Agency "to make grants to any State, municipality, or intermunicipal or interstate agency for the construction of publicly owned treatment works." 33 U.S.C. 1281(g)(1); see also

Shanty Towns Assocs. Ltd. P'ship v. EPA, 843 F.2d 782, 785 (4th Cir. 1988). According to EPA regulations governing its construction grant program, the agency will not award a construction grant unless the Regional Administrator determines that the treatment system "would not provide capacity for new habitations or other establishments to be located on environmentally sensitive land such as wetlands . . . ." 40 C.F.R. § 35.925-13.[15]

In practice, EPA conditioned grants for some treatment plants to ensure a community does not allow wastewater discharges to the plant if the wastewater originates from a facility which is erected in a jurisdictional wetland. Thus, even if a property owner can obtain a section 404 permit in those communities, once the Corps determines that an area is a "wetland," the property owner cannot obtain approval to discharge wastewater into the treatment plant. In many instances this makes the property undevelopable and puts an end to the proposed project.

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[15] EPA now assists with the construction of wastewater treatment plants through with Clean Water State Revolving Funds, as appropriations under the CWA ended in 1990. 33 U.S.C. § 1285.

E. The Rights of Eligible Communities Under the National Flood Insurance Program are Impacted by Wetlands Determinations.

The National Flood Insurance Program (NFIP) makes federally-backed flood insurance available to eligible communities that have adopted land use measures that are consistent with the minimum criteria established by the Federal Emergency Management Agency (FEMA). 42 U.S.C. §§ 4022(a), 4102(c). One section of the National Flood Insurance Act establishes an incentive-based program called the Community Rating System (CRS). 42 U.S.C. § 4022(b). Through insurance discounts, CRS encourages communities to undertake floodplain management measures that go beyond the minimum land use criteria for NFIP eligibility. *Id.*

Residents of CRS communities that conduct advanced activities receive reductions in their flood insurance premiums. The more "points" a community obtains, the greater the reduction in the premiums that must be paid. According to FEMA, the "reductions range from 5% to 45% annually, depending on the rating the community earns by carrying out CRS-qualified tasks."[16]

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[16] FEMA, *NFIP/CRS Update*, February 2009, http://www.fema.gov/library/viewRecord.do?id=3297 (last visited Mar. 10, 2009).

Among the ways that communities can improve their CRS rating is by protecting wetlands. For example, if a community requires real estate agents to disclose flood related hazards, such as wetlands to buyers, the community can obtain rating points.[17] Similarly, communities obtain points for preserving certain open space, including wetlands.[18]

Therefore, once the Corps has determined that certain areas in a CRS community are wetlands, that community cannot obtain CRS "points" if it allows the property owners to develop those areas. Thus, the manner in which a community treats features that the Corps considers jurisdictional under the CWA can impact the cost of flood insurance for its citizens.

* * *

To conclude, there are many examples of legal rights and obligations that flow from a Corps determination that properties contain CWA jurisdictional waters, including wetlands. The court of appeals was simply incorrect in maintaining that a JD is not final agency action because such a determination only takes on consequence in the context of a section 404 permit application or a CWA enforcement action.

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[17] FEMA, *NFIP CRS Coordinator's Manual*, 340-1, 340-6 (2006).

[18] *NFIP CRS Coordinator's Manual*, 510-12-16 (2006).

CONCLUSION

For the foregoing reasons, the petition should be granted.

March 23, 2009.

Respectfully submitted.

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APPENDIX

APPENDIX A

Cases in which NAHB has appeared as an amicus curiae or "of counsel" before this Court include:

Agins v. City of Tiburon, 447 U.S. 255 (1980); *San Diego Gas and Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Ore.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Franconia Assocs. v. United States*, 536 U.S. 129 (2002); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Kelo v. City of New London*, 545 U.S. 469 (2005); *S.D. Warren Co. v. Me. Bd. of Envtl.*

Prot., 547 U.S. 370 (2006); *Rapanos v. United States*, 547 U.S. 715 (2006); *John R. Sand and Gravel Co. v. United States*, 128 S.Ct. 750 (2008); *Winter v. Nat. Res. Def. Council, Inc.*, 129 S. Ct. 365 (2008); *Summers v. Earth Island Inst.*, 129 S. Ct. 1142 (2009); *Entergy Corp. v. Envtl. Prot. Agency*, 475 F.3d 83 (2d Cir. 2007), *cert. granted*, 128 S. Ct. 1867 (2008) (consol. with Nos. 07-589 and 07-597); and *Coeur Alaska, Inc. v. S.E. Alaska Cons. Council*, 486 F.3d 638 (9th Cir. 2007), *cert. granted*, 128 S. Ct. 2995 (2008) (No. 07-984, consol. with 07-990).

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No. 08-1052

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In The

Supreme Court of the United States

FAIRBANKS NORTH STAR BOROUGH,

Petitioner,

v.

U.S. ARMY CORPS OF ENGINEERS,
JOHN W. PEABODY, AND KEVIN J. WILSON,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

BRIEF OF THE STATE OF ALASKA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The State of Alaska has a keen interest in this case. It seeks to protect its traditional state authority to plan the development and use of its land and water resources, in the face of questionable assertions of authority from an often overbearing federal agency. *See* 33 U.S.C. § 1251(b). Alaska also has an interest as owner of over 100 million acres of land, granted by Congress at statehood to help the State finance its new government. *See* Alaska Statehood Act, § 6, Pub. L. No. 85-508, 72 Stat. 339 (1958). Over 43% of the land in Alaska, comprising some 174 million acres, is classified as wetlands by the federal government. U.S. Fish and Wildlife Service, *Status of Alaska Wetlands* 19 (1994), *available at* http://www.fws.gov/wetlands/_documents/gSandT/StateRegionalReports/StatusAlaskaWetlands.pdf. On Alaska's North Slope Coastal Plain, approximately 83% of the surface area is classified as wetlands. *Id.* at 20. This area is frozen most of the year and underlain by permafrost year-round. In addition, Alaska has innumerable other surface waters such as lakes and rivers. As this Court has acknowledged, more than half of the surface area of Alaska could potentially qualify as "waters of the United States" subject to federal regulation under the Clean Water Act. *Rapanos v. United States*, 547 U.S. 715, 722 (2006); *see also* U.S. Fish and Wildlife Service, *supra*, at 18.

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[1] The state notified the borough ten days prior to the due date of this brief of the intention to file. The state notified the attorney for the Corps on March 20, 2009.

Because of the prevalence of wetlands and other surface waters, many, if not most large-scale projects in Alaska disturb wetlands or surface waters. Virtually every significant public project in Alaska – whether for roads, airports, pipelines, sewers, electrical transmission lines, correctional facilities or courthouses – potentially impacts "waters of the United States," thus triggering a federal permitting process under the Clean Water Act.[2] That permitting process requires a significant investment of time and money. Seven years ago, the average applicant for an individual Section 404 permit spent $271,596 completing the permit process, not including costs of mitigation or design changes. *Rapanos,* 547 U.S. at 721 (citing Sunding & Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Nat. Resources J. 59, 74-76 (2002)). Some applicants spent as much as $1,530,000, again exclusive of mitigation or design change costs. Sunding & Zilberman, *supra*, at 74 n.67. Large public projects in Alaska tend toward, and sometimes exceed, the high end of this scale.

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[2] "Over 90 percent of highway projects in Alaska affect protected resources (e.g., wetlands, anadromous fish streams, or essential fish habitat)." *Alaska Environmental Procedures Manual*, Alaska Department of Transportation and Public Facilities at 1-5 (2002), *available at* http://www.dot.state.ak.us/stwddes/dcsenviron/assets/pdf/manual/ch01.pdf.

Because so much of Alaska is potentially subject to the authority of the Army Corps of Engineers under the Clean Water Act, the State is concerned about the process by which the Corps' jurisdictional determinations are made and reviewed. The need for immediate court review of jurisdictional determinations is heightened by the legal uncertainty surrounding the scope of "waters of the United States" in the wake of *Rapanos*. As discussed in the argument section of this brief, to delay judicial review of the Corps' jurisdictional determination until the permitting process is complete may effectively deny the right to review, and certainly denies the opportunity for meaningful relief if the Corps wrongfully asserts jurisdiction. Timely judicial review of jurisdictional determinations is critical for Alaska and Alaskans because of the prevalence of potential wetlands in the state, the likelihood of controversial jurisdictional determinations, and the burdens of the permitting process. Alaska therefore urges the Court to hear this case and to ensure meaningful judicial review of the Corps' assertion of jurisdiction over the land in this state.

SUMMARY OF ARGUMENT

A jurisdictional determination by the Corps of Engineers is final agency action immediately reviewable by a court. The Ninth Circuit incorrectly held that the jurisdictional determination in this case did not meet the finality test of *Bennett v. Spear*, 520 U.S.

154 (1997), because in its view the decision was not an "action by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *See id.* at 178. While the Clean Water Act requires a Section 404 permit to discharge "dredged or fill" material into "waters of the United States," 33 U.S.C. § 1344, neither the statute nor the Corps' regulations clearly delineate what *lands* might be sufficiently saturated to fall within the scope of the statute. Only the Corps' jurisdictional determinations definitively impose the Clean Water Act's requirements on a landowner. Therefore, the agency's decision is what ultimately determines the obligations of the applicant.

Alternatively, if the Corps' jurisdictional determination is not final agency action, it should be immediately reviewable under the collateral order doctrine. The jurisdictional determination is the Corps' conclusive decision on the disputed question; it resolves an important issue separate from the merits of the action; and the applicant's interest are no longer capable of vindication after the costly and difficult Section 404 permitting process is complete.

ARGUMENT

I. THE CORPS' JURISDICTIONAL DECISION CONSTITUTES FINAL AGENCY ACTION BECAUSE THE CLEAN WATER ACT ALONE IS TOO VAGUE TO IMPOSE RECOGNIZABLE LEGAL OBLIGATIONS ON A LANDOWNER WHO WISHES TO DEVELOP PROPERTY.

The parcel of land that Fairbanks wishes to develop for recreation, with playgrounds, athletic fields, concession stands, and parking lots, does not contain anything recognizable as "waters of the United States." *See Fairbanks North Star Borough v. U.S. Army Corps of Engineers*, 543 F.3d 586, 589 (9th Cir. 2008). Fairbanks does not believe that the parcel contains "waters of the United States" requiring Section 404 permits because the land is not "periodically inundated," does not have "saturated soils during the growing season," and is "underlain by shallow permafrost at a depth of 20 inches" that does not "exceed zero degrees Celsius at any point during the calendar year." *Id.* at 590. But because the Corps interprets the Clean Water Act as broadly as possible, to extend to the full reach of the Commerce Clause, *see Rapanos*, 547 U.S. at 724 (citing 42 Fed. Reg. 37144 n.2 (1977)), Fairbanks prudently asked for a jurisdictional determination before beginning the project. *Fairbanks North Star Borough*, 543 F.3d at 589. Fairbanks asked the Corps to determine whether it could proceed with this project without permits, and asked that, if the parcel contained "waters of the

United States" subject to the Clean Water Act, the Corps provide a drawing depicting the "wetlands in relation to the lot boundaries." *Id.* In response, the Corps issued a jurisdictional determination finding that "the entire parcel . . . contains waters of the United States . . . under our regulatory jurisdiction." *Id.* The Corps' letter stated that under the Clean Water Act, the borough must obtain a permit before it could place dredged or fill material on the land. *Id.* at 590.

A Ninth Circuit panel found that the Corps' jurisdictional determination did not constitute final agency action under the Administrative Procedures Act, 5 U.S.C. § 704, holding that it did not meet the second prong of this Court's test set forth in *Bennett*, 520 U.S. 154. While the panel held that the Corps' jurisdictional determination "announces the Corps' considered, definite and firm position about the presence of jurisdictional wetlands on Fairbanks' property," *Fairbanks North Star Borough*, 543 F.3d at 593, it found that it was not an "action . . . by which 'rights or obligations have been determined,' or from which 'legal consequences will flow,'" *id.* (quoting *Bennett*, 520 U.S. at 178). According to the panel, the jurisdictional determination was merely the Corps' "expression of views" of "what the law requires," and Fairbanks would "face liability only for noncompliance with the CWA's underlying statutory commands, not for disagreement with the Corps' jurisdictional determination." *Id.* at 594 (quoting *Ukiah Valley Med. Ctr. v. FTC*, 911 F.2d 261, 264 (9th Cir. 1990) and

AT&T v. EEOC, 270 F.3d 973, 975 (D.C. Cir. 2001)). The panel found that the jurisdictional determination had only "practical" consequences, because regardless of the Corps' view, the parcel was either "waters of the United States" for purposes of the Clean Water Act, or it was not. *See id.* at 595. Therefore, according to the panel, the Corps' opinion did not "alter the physical reality or the legal standards used to assess that reality," and was of no more consequence than "a report by a private wetlands consultant informing Fairbanks that its property contained wetlands." *Id.*

This analysis parses all meaning out of the second *Bennett* prong. The Corps' jurisdictional determination is more than a mere opinion; it is that agency's legal conclusion that it has jurisdiction over a particular parcel of land – a jurisdiction that is not apparent from the terms of the statute, the implementing regulations, or examination of the parcel. And legal consequences for the applicant *do* flow from the Corps' assertion of jurisdiction. The applicant is required to obtain a permit to discharge into "waters of the United States" or face serious civil and criminal penalties. *See* 33 U.S.C. § 1319(b)-(c). In cases such as this, where the land does not clearly contain such waters, the statutory requirement depends on the Corps' interpretation of the Act. The Corps' jurisdictional decision makes the Clean Water Act's statutory commands applicable to the particular parcel, and therefore it effectuates the developer's obligation to follow the Act.

A. For Some Property, the Legal Obligations of the Clean Water Act Depend Upon the Agency's Interpretation of the Statute, as Applied to a Particular Parcel of Land.

For land such as Fairbanks' proposed park, the Clean Water Act's legal obligations take effect only in concert with the agency's interpretation. The Ninth Circuit's concept that the Corps' jurisdictional determination has no legal consequences because it exists independently from the obligations of the Clean Water Act makes no sense in the context of Section 404 permits. At least in wetlands cases such as this, the lands to which the Clean Water Act applies – those containing "waters of the United States" – are often identifiable as such only through the Corps' analysis. For example, the language of the statute does not provide clear guidance when applied to the frozen lands in this case, which are not obviously included in a law intended "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The magnitude of the Corps' interpretative authority is heightened by the lack of direction from the Court "on precisely how to read Congress' limits on the reach of the Clean Water Act," causing regulated entities to "feel their way on a case-by-case basis." *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring).[3] For cases such as

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[3] In addition to the vagueness of the Clean Water Act, courts in the post-*Rapanos* era face the added difficulty of

(Continued on following page)

this, the statutory permitting requirements have a recognizable legal effect only if and when the Corps decides that particular parcels of property contain the vaguely-defined "waters of the United States."

The statutory language is general. It provides that "any addition of any pollutant to navigable waters from any point source" "by any person shall be unlawful." 33 U.S.C. §§ 1311(a), 1362(12). "Pollutant" includes not only traditional contaminants, but also solids such as "dredged spoil, . . . rock, sand, [and] cellar dirt." § 1362(6). "Navigable waters" are defined as "the waters of the United States, including the territorial seas." § 1362(7). While the statutory language clearly prohibits discharging pollutants into navigable lakes, rivers, and the territorial sea, its application to solid land is less obvious and manifestly counterintuitive. *Cf. Rapanos*, 547 U.S. at 734 (plurality opinion) (finding that, as to specific examples of Corps' determinations, "[t]he plain language of the [Clean Water Act] simply does not authorize this 'Land Is Waters' approach to federal jurisdiction.").

The Corps' regulations also fail to offer clear guidance to the question of whether a particular parcel of land falls within the scope of the Clean

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deciding which opinion in that case to follow. *See, e.g., U.S. v. Cundiff*, 555 F.3d 200, 208 (6th Cir. 2009) (discussing difficulty in determining which *Rapanos* opinion relied on the "narrowest grounds," the traditional test for following plurality opinions under *Marks v. U.S.*, 430 U.S. 188 (1977)); and *U.S. v. Robison*, 521 F.3d 1319 (11th Cir. 2008) (same).

Water Act. They interpret the "waters of the United States" to include "mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. § 328.3(a)(3).

And whether a parcel contains wetlands is not self-evident. Wetlands are defined as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. § 328.3(b). The Corps' Wetlands Delineation Manual, including over 100 pages of technical guidance for Corps officers, interprets this definition of wetlands to require: (1) prevalence of plant species typically adapted to saturated soil conditions, determined in accordance with the United States Fish and Wildlife Service's National List of Plant Species that Occur in Wetlands; (2) hydric soil, meaning soil that is saturated, flooded, or ponded for sufficient time during the growing season to become anaerobic, or lacking in oxygen, in the upper part; and (3) wetland hydrology, a term generally requiring continuous inundation or saturation to the surface during at least five percent of the growing season in most years. *See Wetlands Research Program Technical Report* Y-87-1 (on-line edition), pp. 12-34 (Jan. 1987), *available at* http://el.erdc.usace.army.mil/elpubs/pdf/wlman87.pdf.

These indefinite guidelines effectively give the Corps authority to decide, on a case-by-case basis, who must follow the Act's requirements. "[T]he definitions [the Corps uses] to make jurisdictional determinations are deliberately left 'vague.'" *Rapanos*, 547 U.S. at 727 (citing U.S. General Accounting Office, *Report to the Chairman, Subcommittee on Energy Policy, Natural Resources and Regulating Affairs, Committee on Government Reform, House of Representatives, Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction*, GAO-04-297, pp. 20-22 (Feb. 2004)). The regulations "leave room for interpretation by the Corps districts when considering jurisdiction over, for example . . . adjacent wetlands." GAO Report at 2. These ambiguous standards require subjective judgment calls by the Corps about "topographic features, geological and soil characteristics, fauna and flora, and other environmental factors" to determine whether property contains "wetlands" that should be considered "waters of the United States." *See id.* at 26. In general, "Corps' staff conduct jurisdictional determinations by considering a range of factors, and they often view each factor's importance within the context of the actual site of a proposed project." *Id.* at 7. The Corps has acknowledged that, "given the complexity of nature and the need for some degree of flexibility within and among districts,"

"nationwide consistency in making jurisdictional determinations" is "not possible to achieve." *Id.* at 26.[4]

The Corps' subjective judgments and ultimate decision to apply the law to a particular parcel inextricably ties its jurisdictional determination to the legal obligations imposed by the Clean Water Act. In these cases the statutory term "waters of the United States" has no effective meaning or application independent of the Corps' determination. While the underlying legal obligation to acquire permits for discharging into wetlands arises from the statute, the Act itself is so vague as to what constitutes "waters of the United States," that in effect, it does not specify to whom that legal obligation applies. When the statute's applicability is unrecognizable to a landowner without a declaration from the Corps, the statute has legal force only through that declaration. For these lands, the jurisdictional determination is an action by which "obligations [of the landowner] have been determined," and from which "legal consequences will flow." *Bennett*, 520 U.S. at 178.

The Ninth Circuit's proverbial "private wetlands consultant," in contrast, could only make an educated guess about what the Corps would conclude from any particular combination of physical factors; he or she

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[4] Under the Corps' regulations, a final jurisdictional determination issued for a parcel of land has no precedential effect. *See* 33 C.F.R. § 331.7(g). Each jurisdictional determination is left to the Corps' judgment, regardless of its past practices.

would certainly not find a clear answer in the statute or regulations. The Corps' jurisdictional determination and the opinion of the private consultant differ in two other significant ways as well: a court will give deference to the agency's interpretation of whether a parcel contains "waters of the United States," and the Corps enforces the permitting requirement of 33 U.S.C. § 1344(a) for discharges into these waters.

B. A Decision that an Applicant Must Obtain a Permit, Made by the Agency that Enforces the Permit Requirement, Determines the Applicant's Legal Obligations.

The decision by the Corps that a parcel of land contains wetlands is a determination by the enforcement agency that the applicant must obtain permits to develop the land. Because the agency enforces the law according to its own analysis, the Corps' jurisdictional determination does not "simply 'remind[ ]' affected parties of existing duties," as the Ninth Circuit panel found. *Fairbanks North Star Borough*, 543 F.3d at 595 n.10.

Rather, it is an agency decision to which a reviewing court will defer. As discussed above, the Corps' determination of the existence of wetlands requires it to consider a multitude of factors. The Corps must make judgments as to how wet (or iceladen) a parcel's soil must be, and for how long, in deciding whether it should be considered "wetlands."

Agencies given authority under statutes "such as the Clean Water Act are afforded generous leeway by the courts in interpreting the statute they are entrusted to administer." *Rapanos*, 547 U.S. at 758. Because of the individual nature of any given parcel of land, Congress left it to the Corps to determine if the landowner is subject to the Act, and because soil, plant, and water analysis is not within the expertise of courts, they are likely to respect the agency decision. *See, e.g., U.S. v. Deaton*, 332 F.3d 698, 713 (4th Cir. 2003) (deferring to the Corps' interpretation, since it "deals in a complex scientific field, wetlands ecology and hydrology."). This deference gives significant legal weight to the Corps' assertion of jurisdiction.

And the Corps is the agency charged with enforcing the Section 404 permitting requirements. 33 U.S.C. § 1344(a). For this reason alone, the Ninth Circuit is wrong in finding that the Corps' jurisdictional determination has no more legal effect on the applicant's obligation to get a permit than would a report by a private consultant. *See Fairbanks North Star Borough*, 543 F.3d at 595. Nor does the Corps' analysis simply "place[Fairbanks] on notice that construction might require a Section 404 permit," as the Ninth Circuit suggested. *Id.* Instead, the Corps' decision asserts jurisdiction over the land based on its analysis of the "physical realities," thereby altering the legal regime to which the landowner is subject. The Corps demands compliance, as evidenced by its letter informing Fairbanks that, based

on the jurisdictional determination, the borough must acquire Section 404 permits to proceed with its project. *See id.* at 590. The Corps' assertion of jurisdiction becomes part of the permanent record of the parcel, and exposes applicants such as Fairbanks to sanctions if they do not honor it. *See, e.g., Rapanos*, 547 U.S. at 720 ("[F]or backfilling his own wet fields, Mr. Rapanos faced 63 months in prison and hundreds of thousands of dollars in criminal and civil fines.").

The Ninth Circuit panel parsed this point far too finely, finding that "[t]he approved jurisdictional determination did not augment the Corps' legal authority to pursue enforcement action," since "Fairbanks' legal obligations – including the obligation to pursue a Section 404 dredge and fill material discharge permit – have always arisen solely on account of the CWA." *Fairbanks North Star Borough*, 543 F.3d at 596. That reasoning assumes that the scope of lands containing "waters of the United States" necessarily has meaning apart from the Corps' interpretation. This assumption is simply not true for wetlands, which at best fall on the margins of the Clean Water Act. *See U.S. v. Riverside Bayview Homes*, 474 U.S. 121, 131 (1985) (stating that the phrase "water of the United States" in the Clean Water Act refers primarily to "rivers, streams, and other hydrographic features more conventionally identifiable as 'waters'" than the wetlands adjacent to such features). It is even less true for purported wetlands underlain with permafrost, as is much of the land in Alaska. U.S.

Fish and Wildlife Service, *supra*, at 19-20. For these lands, the jurisdictional determination did *more* than "augment the Corps' legal authority to pursue enforcement action," *Fairbanks North Star Borough*, 543 F.3d at 596; the jurisdictional determination itself made the Act enforceable against Fairbanks, which would be subject to criminal, civil, and administrative penalties should it fail to comply. *See* 33 U.S.C. § 1319(b)-(c), (g). It was that decision, not the Clean Water Act alone, that made Fairbanks legally obligated to begin the process during which "[t]he average applicant for an individual permit [spent] 788 days and $271,596 in 2002." *Rapanos*, 547 U.S. at 721 (citing Sunding & Zilberman, *supra*, at 74-86).

II. EVEN IF THE NINTH CIRCUIT WERE CORRECT THAT THE JURISDICTIONAL DETERMINATION IS NOT A FINAL AGENCY ACTION, THE COURT SHOULD FIND IT REVIEWABLE UNDER THE COLLATERAL ORDER DOCTRINE.

The Court should accept and decide this case on the alternative ground that a court may immediately review a jurisdictional determination under the collateral order doctrine. Delaying the right to court review until after the permitting is complete requires the applicant to submit to a process so difficult, expensive, and time-consuming that an after-the-fact court challenge loses its purpose.

This Court adopted the collateral order doctrine in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S.

541, 546 (1949), describing a "small class" of orders that do not end the proceedings below but that should, for systemic reasons, be treated as final and immediately appealable. While the Court developed the collateral order doctrine to provide relief from overly strict application of the requirement that appellate courts review only final decisions of district courts, *see* 28 U.S.C. § 1291, the Court has suggested that the doctrine should also apply to an order that impacts but does not end an administrative proceeding. *See, e.g., FTC v. Standard Oil Co.*, 449 U.S. 232, 246 (1980) (applying the collateral order doctrine to determine the reviewability of an agency order); *see also Bell v. New Jersey and Pennsylvania*, 461 U.S. 773, 778 (1983) ("*[A]t least in the absence of an appealable collateral order* . . . the federal courts may exercise jurisdiction only over a final order of the Department [of Education]."") (emphasis added; citations omitted).

In *Cohen*, the Court adopted a practical construction of finality, holding that under limited circumstances an order that does not actually end litigation may be reviewed as a "final" order. 337 U.S. at 546. To be immediately appealable, an order must meet three criteria: it must "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). These requirements "help qualify for immediate appeal classes of orders in which the

considerations that favor immediate appeals seem comparatively strong and those that disfavor such appeals seem comparatively weak." *Johnson v. Jones*, 515 U.S. 304, 311 (1995).

The Corps' decision to assert jurisdiction over a parcel of land meets these three requirements and therefore should be considered a final order subject to immediate review. First, the order "conclusively determines the disputed question." *See Coopers & Lybrand*, 437 U.S. at 468. The Corps has established a formal procedure for affected parties to solicit its official and final position about the existence and extent of Clean Water Act regulatory jurisdiction over a particular parcel. *See* 33 C.F.R. Part 331. "An approved [jurisdictional determination] is an official Corps determination that jurisdictional [waters under the Clean Water Act] are either present or absent on a particular site." Jurisdictional Determinations, Corps Regulatory Guidance Letter 08-02, at 1 (June 26, 2008), *available at* http://newsletters.wetlandstudies.com/docUpload/RGL08021.pdf. After the district engineer's approved jurisdictional determination has been upheld by the division engineer, no further administrative appeal is possible. *See* 33 C.F.R. § 331.9. In this case, the Ninth Circuit held that "an approved jurisdictional determination upheld in the Corps' administrative appeal process 'mark[s] the consummation of the agency's decision-making process' for determining whether the Corps conceives a property as subject to CWA jurisdiction." *Fairbanks North Star Borough*, 543 F.3d at 591. The

jurisdictional determination the Corps issued in this case "is 'devoid of any suggestion that it might be subject to subsequent revision' or 'further agency consideration or possible modification.'" *Id.* (citing *City of San Diego v. Whitman*, 242 F.3d 1097, 1102 (9th Cir. 2001) and quoting *Ontario v. EPA*, 912 F.2d 1525, 1532 (D.C. Cir. 1990) and *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 436-47 (D.C. Cir. 1986)).

The jurisdictional determination also meets the second requirement for application of the collateral order doctrine, because it resolves an important issue that is separate from the merits of the action. *See Coopers & Lybrand*, 437 U.S. at 468. The question of whether the Corps has authority under the Clean Water Act to assert jurisdiction over a parcel of land is both important and entirely separate from the merits of whatever permitting requirements the Corps may impose on the landowner proposing to develop the land.

Finally, the jurisdictional determination is "effectively unreviewable on appeal from a final judgment." *Id.* The use of the word "effectively" recognizes that an order may be technically subject to review at the end of a case, but that the appealing party's interests may not be capable of vindication at that late date. *See, e.g., Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985) (discussing the need for immediate review of interlocutory orders refusing to grant qualified immunity); *Abney v. United States*, 431 U.S. 651, 660-62 (1977) (discussing the need for immediate review of interlocutory orders rejecting claims of

double jeopardy). "The requirement that the issue underlying the order be 'effectively unreviewable' later on . . . means that failure to review immediately may well cause significant harm." *Johnson,* 515 U.S. at 311.

In the context of the Corps' jurisdictional determinations, the lack of immediate review subjects the landowner to the authority and the accompanying procedural demands of a federal agency. Before the applicant can contest the Corps' assertion of jurisdiction, it must first slog through a permitting process that on average takes over two years, but can take much longer, *see* Sunding & Zilberman, *supra*, at 75-76, and that requires patience, diplomacy, and a deep pocket to complete. Even preparing the application is arduous; for example, the Section 404 permit application of the City of Chicago for an airport project was "a four-volume document that [was] hundreds of pages long." *National Mitigation Banking Ass'n v. U.S. Corps of Engineers,* 2007 WL 495245 at *3 (N.D. Ill. 2007).

After the application is prepared, federal and state regulatory agencies must certify, approve, or at least agree not to contest, the Section 404 permit. *See, e.g.,* 33 U.S.C. § 1344(c) (giving U.S. Environmental Protection Agency veto power); 33 U.S.C. § 1344(m) (granting U.S. Fish & Wildlife Service comment right); 33 U.S.C. § 1341 (requiring state agency certification). When combined with concurrent

permitting under a host of other federal, state, and local laws,[5] multi-pronged discussions often lead to conditions imposed on the applicant through the Section 404 permit. 33 C.F.R. § 325.4 (codifying Corps' authority to impose conditions). Permit applicants – particularly public applicants – must make public commitments to agencies and citizen groups concerning mitigation measures, must seek approvals from agencies and sometimes from local legislative bodies, and must pay for studies, designs, and mitigation.

The mitigation requirement alone can be complex and time-intensive. The compensatory mitigation review, which is embedded within the Section 404 permitting regime, makes "[p]ermit applicants . . . responsible for proposing an appropriate compensatory mitigation option to offset unavoidable impacts."

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[5] The wetlands development process often begins years before any design is honed to the point that a formal application for a wetlands permit can be filed. Through the National Environmental Policy Act, the public, agencies, and governments, including the Corps of Engineers, review the lands the Corps claims as jurisdictional, study practicable alternatives, and work out mitigation measures. The impacts of placing fill can require analysis, approval, and commitments to mitigate under the Coastal Zone Management Act, Clean Air Act, Marine Mammal Protection Act, Endangered Species Act, Migratory Bird Treaty Act and others, with each federal, state, and local act adding its own layer of procedures and approvals. *See, e.g.*, list appended to Alaska Interagency Consultation and Coordination Agreement for FHWA/DOT&PF Transportation Projects, *available at* http://www.dot.state.ak.us/stwddes/dcsenviron/assets/pdf/resources/akicca.pdf (showing agreement among nine agencies concerning permit coordination).

33 C.F.R. § 332.3(a)(1). The Corps will agree to specific mitigation only when the district engineer deems it sufficient to compensate for unavoidable impacts to "waters of the United States." *Id.* Many variables are considered in determining the appropriate type, quantity and quality of mitigation. For example, the Corps would not grant Alaska a Section 404 permit for an airport project unless the airport compensated for the loss of wetlands by agreeing to preserve and rehabilitate an undeveloped portion of an entirely separate bog located four miles away. *See* Brief of Appellee-Intervenor at 20, *Alaska Center for the Environment v. Secretary, U.S. Dept. of the Army*, No. 03-35074, 2003 WL 22724132 (9th Cir. May 10, 2003). The airport commissioned studies of this bog's hydrology and the feasibility of rehydration, and conducted another study to see whether the rehabilitation would pose a hazard to aviation. *Id.* at 20-21. The Corps then analyzed the functions and values of both the airport bogs and the mitigation bog to assure an appropriate level of compensation. *Id.* at 21-22. Three airport bog areas were divided into micro-environments for analysis; one was divided into 123 separate polygons representing micro-environments as small as .1 acre, so that the agencies could compare the biologic functions of the flarks (small depressions), associated stangs (small ridges), and vegetative communities among the bogs. *Id.* at 22. The airport was required to conduct this field work to study and compare each micro-environment within the proposed fill area with the area proposed for compensatory mitigation, in

order to come to agreement with the Corps on the conditions for a Section 404 permit. *Id.*

This is only a moderate example of the work that mitigation can require; it can also require that the landowner trade or purchase other lands as compensation. *See, e.g., Floridian Clean Water Network, Inc. v. Grosskruger*, 587 F.Supp.2d 1236, 1239 (M.D. Fla. 2008) (discussing Corps' requirement that an airport authority arrange to have approximately 10,000 acres of adjacent land put under conservation easements in order to fill 1,530 acres of land); *National Mitigation Banking Ass'n*, 2007 WL 495245 at *1 (discussing Corps' requirement that, as a condition to a Section 404 permit to fill 97.1 acres of wetlands, the City of Chicago pay approximately $4.5 million to a mitigation bank provider in exchange for 62 acres of mitigation credits and pay $26 million to an in-lieu fee provider that agreed to undertake an additional 280 credits of mitigation); *Sierra Club v. U.S. Army Corps of Engineers*, 450 F.Supp.2d 503, 513 (D.N.J. 2006) (discussing the condition on a Section 404 permit to fill 7.69 acres of wetlands that developer enhance 15.38 acres of wetlands offsite and preserve a tract "containing hundreds of acres of wetlands, by means of causing a conveyance in fee to [a conservation trust]."), *vacated*, 277 Fed.Appx. 170 (3rd Cir. 2008).

Having made the public commitments, obtained the approvals and votes, and expended the funds, the permit applicant has already suffered the consequences of the Corps' jurisdictional determination. Even if the applicant believes deeply that the

jurisdictional determination was improper, challenging the agency's underlying legal authority cannot vindicate the applicant's interests once it has spent the time, money and political capital to get through the permitting process. The Corps has already flexed its regulatory muscle – possibly without authority – and the landowner's bundle of property interest sticks has been compromised. By that point, the jurisdictional determination has become "effectively unreviewable."

In order to prevent this result, the collateral order doctrine should apply to allow immediate court review of a jurisdictional determination by the Corps.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

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